THE

LAW QUARTERLY REVIEW.

No. IV. October, 1885.

NOTES.

I. Stoppage in Transitu.

Kendal v. *Marshall*, 11 Q. B. D. 356. *Ex parte Miles*, 15 Q. B. D. 39. *Davison* v. *Collison*, 'Times,' March 14, 1885.

THE above cases seem sufficient to enable one to ascertain the rules of law with reference to some questions bearing on stoppage in transitu which have hitherto involved some difficulty or doubt.

In *Ex parte Miles*, the judgment of the Master of the Rolls is founded on the proposition laid down by Lord Ellenborough in *Dixon* v. *Baldwin*[1], that where goods have been sent by the vendor to the agent of the purchaser who has to receive instructions from his principal for the purpose of forwarding them, without which orders they would continue stationary, the transit is at an end when the goods reach such agent's hands. The same proposition, in somewhat different terms, is enunciated by Grove J. in *Davison* v. *Collison*: 'The transit ends where the goods have reached the hands of an agent who requires the authority of the purchaser to send them on.'

This view of the law does not however appear to be perfectly satisfactory. It seems to have been thought, at one time, that the transit was only at an end, if at the time the goods reached the agent he was waiting for orders to send them on: but now it is established that it is immaterial whether the orders to forward are given before or after the delivery of the goods to the agent. Since, then, the purchaser's agent cannot in any case be entitled to forward the goods without the authority of his principal, it follows that the proposition above referred to does not afford a really satisfactory test. I think, however, the following three rules reconcile all the

[1] 5 East, 175.

cases which have been correctly decided, and are sufficient to solve the questions which present themselves on this branch of the law relating to stoppage in transitu:

1. Where goods are sold 'free on board,' the transit is not at an end when the goods have been shipped, but continues until the termination of the voyage: and the goods may be stopped at any time before such termination although the vendor may not have known, at the time of the sale, for what port they were destined. (See *Ex parte Rosevear China Clay Co.*, 11 Ch. D. 560; *Berndtson* v. *Strang*, L. R., 4 Eq. 481, 3 Ch. 588.)

In the case supposed the goods are, in fact, placed by the vendor in the hands of the carrier, who is not the agent or servant of the purchaser, but an intermediary between him and the vendor.

2. Where by the agreement between the vendor and purchaser the former is to send the goods to a place *A*, and for that purpose they have to be placed in the hands of agents for the purpose of being transmitted to *A*, the transit is not at an end until the goods arrive there, subject however to the purchaser's power of intercepting them, by actually taking possession at some intermediate place. And this holds good, although the agents are persons appointed by the purchaser and bound to obey his orders.

3. Where, according to the contract of sale, the vendor is to send the goods to an agent of the purchaser at *B*, the transit is at an end as soon as such agent receives them, although the vendor is informed that they are destined for another place, and are to be forwarded there by that agent, and although the latter may employ the seller's servant or agent to forward them to their ultimate destination.

II. On the Amendment of our Legal Procedure.

There are a large number of actions in which money may be paid into Court for the purpose of satisfying the plaintiff's claim, and it is impossible for the defendant to know the exact sum which may be ultimately found to be sufficient for that purpose. Cases of salvage and personal injuries, for instance, give rise to actions of this character. According to our present system, if the sum paid into Court is less than that which is found to be due to the plaintiff, the defendant has, as a rule, to pay all the costs of the action, although the plaintiff's claim may have been exorbitant or excessive. There seems to be an easy mode of remedying the injustice frequently resulting from this rule of practice. The plaintiff should be obliged, after the defendant has paid into Court, to state exactly what sum he, the plaintiff, claims. The defendant should then be at liberty to increase the amount of his tender, the plaintiff being in like

manner allowed to diminish his claim, and this operation should be permitted to continue until notice of trial is given.

Unless some good reason to the contrary is shown, the costs of the action or defence should be awarded to whichever party has named the sum nearest in amount to that actually found to be due. In cases tried before a jury the same process might be adopted, care however being taken to prevent the sums named by the parties from being communicated to the jury before they have given their verdict.

I think there is no doubt whatever that if such a procedure were adopted, much expensive litigation would be avoided, as both parties would find it to their interest to endeavour, by modifying their estimate of the claim, to arrive at a reasonable compromise, and the costs, in case a trial did take place, would fall upon the party who had occasioned the expense by refusing the offer which his opponent made to him.

ARTHUR COHEN.

ON LAND TENURE IN SCOTLAND AND ENGLAND.

II.

IN the Scotland of David I. and the Alexanders, authentic records and genuine tradition combine to afford glimpses of a picture of material prosperity enjoyed under a strong government and in times of comparative peace. Manors of a type identical with that prevailing throughout England are found widely established; and in both countries alike are found underlying the manorial system the traits of a more archaic community of plough cultivators. The people are of various, and still distinct, races. The superior landlords are of one class, Normans with an infusion of English blood; and kindred with the ruling class in England. But the disadvantages of a military and land-endowed caste are mitigated by the sway of a Sovereign able and willing to protect the rights of the peasant and maintain the cause of the poor. The effect of the close relation between the ruling classes in the two countries is seen in the identity in their main features, of the systems of administration and of land tenure in each.

These harmonious relations are broken by the imperial design of Edward, its temporary achievement and ultimate failure. From the War of Independence the people of Scotland emerged as a nation, in which heterogeneous elements had been welded together under a common pressure. The barons who held estates in both countries have had to elect; and those who chose the fortunes of the Bruce became more Scotch than the Scots, or Irish Celts, from whom their land received its name. The faithful leaders are rewarded with lands resumed from owners who have virtually forfeited them, by residence in England *contra fidem et pacem regis*. The humbler classes are no less profoundly and permanently affected by the movement. A peasantry who had effectually learned and practised the lesson, first taught by Wallace, how spearmen on foot might baffle the attack of the hitherto invincible men-at-arms, were in a fair way towards the emancipation more tardily, and by the aid of the Black Death, accomplished in England. The constant warfare for nearly a hundred years afforded employment for a free peasantry; and in the latter part of the fourteenth century the writ *de nativo fugitivo* had become virtually obsolete in Scotland[1].

[1] The last claim of neyfship or serfdom proved in a Scotch Court was in 1364. Innes, Scotch Legal Antiquities, p. 159.

The condition of the Scotch peasantry about this period is brought into picturesque relief by an incident duly noted in the chronicles as well as marked on the statute-book of the time. In the year 1385, when a close alliance subsisted between Scotland and France, an aid was sent from the latter country consisting of one thousand complete stand of armour, fifty thousand gold pieces, and two thousand men, one thousand of them being mounted men-at-arms. The money and the armour were esteemed a god-send; the men were superfluous and embarrassing. They were kept employed, however, and entertained in such fashion as the resources of a poor country would admit; but the situation became strained between hosts and guests, and the visitors returned not without heartburnings on both sides. Of the causes of complaint on the side of the foreigners the most grievous was the rudeness of the peasantry, who resented the carrying off of a cow, and claimed compensation for crops ridden over. The grievance was aggravated by the action of the Scotch Parliament, who laid down stringent regulations for the conduct of the strangers, and for settling their disputes with the rustics. The contrast is emphasized by the account given by Froissart of the home-return of these ill-used knights, who on arrival in their own country were so poor, that they could only remount themselves by seizing the labouring horses wherever they found them in the fields[1].

From this digression I revert to the epoch marked by the War of Independence. It is then that the systems of land tenure in England and Scotland begin to diverge. The result is one of the paradoxes of legal history. In Scotland, where the people resisted to the death the English claim of feudal superiority, the chains of feudal tenure, in its minutest incidents, became rivetted on every parcel of land; in England, the rules of feudal tenure, except as grounding a presumption for the law of intestate succession, have long ceased to be of more than antiquarian interest.

In England the divergence is strongly marked in the legislation under Edward I. Of the enactments by which, in this reign, nearly the whole field of English law was traversed, perhaps the most far-reaching in its results was the chapter of the Statute of Westminster[2]; whereby the period within which the plaintiff in a writ of right should declare the seisin of his ancestor, was limited to the time of Richard I., and shorter periods of limitation were fixed in regard to certain other writs. The principle was not indeed new; and the Statute only followed the precedent of other enactments, the last of which, in the reign of Henry III, had

[1] Burton, Hist. of Scotland, vol. iii. p. 54; Act. Parl. (Robert II,) vol. i. p. 190.
[2] 3 Ed. I. c. 39.

brought down the period of limitation from the time of Henry I. to that of Henry II. But this Statute of Westminster under Edward I. is regarded as the foundation of the modern law of prescription, as based on possession, in England. It has been the charter of many a small freeholder, of the class from whom Oliver Cromwell's Ironsides were recruited. Two other Acts of this reign may be mentioned as marks in the history of tenure and title in England. These are commonly known as the Statute *De Donis*[1] and the Statute *Quia Emptores*[2].

The Statute *De Donis* is important rather as affecting the forms of conveyance and title than the substantial incidents of tenure. It appears to have been passed by the influence of the great landowners who desired the privilege of imposing their own will upon the future devolution of their estates. In the earlier stages of feudal law the tenure was personal to the holder; but it became usual for the superior, on certain terms, to consent to the transmission or alienation of the holding; and gradually the capacity to transmit the property to an heir, or to alienate the estate by deed, became generally recognised. A favourite form of grant appears to have been to a man and his wife and the heirs of the marriage, or to a man and the heirs of his body. Suppose the grant made by A., to B. and the heirs of his body. The words 'heirs of his body' were construed as words of *limitation*, that is to say, limiting the class of persons who were to take in the character of *heirs*. Now, as B.'s issue who would take under this gift took as a species of heirs, i.e., as deriving their right from B., it logically followed that B., by his act of alienation, could defeat the gift to them; and the power of alienation was further so far favoured by law, that B., being in possession of the estate and having issue, could not only disinherit his issue, but defeat the reversion to A., or any remainder which A. might have created by an ulterior gift. From A.'s point of view, however, this was esteemed a grievance. A. meant, or thought he meant, that the estate should at B.'s death go to his son if he had one, and had no idea that he was putting the estate entirely in B.'s power. To remedy this, the Statute declared that the will of the donor, A., according to the form of the gift manifestly expressed, should be observed; so that B. should have no power to aliene the land, but it should remain to the issue to whom it was given after B.'s death, or revert to A. or his heirs if issue fail.

This attempt to defeat a principle of law which, through its general convenience, had grown into popular favour was, naturally,

[1] 13 Ed. I. Stat. I. (Statute of Westminster the Second), ch. I.
[2] 18 Ed. I. Stat. I. (Statute of Westminster the Third).

unsuccessful. Some of the loop-holes are, indeed, obvious. There is nothing to alter the received construction of the word 'heirs,' as persons who take *by way of representation* through B.; or to show that such 'heirs' shall not be bound by B.'s personal obligation, such for instance as an obligation to warrant the title of a purchaser. Further, although B. is expressly placed under disability in regard to alienation, it is not said that any default or omission of his, or judgment suffered by him, shall have no legal effect. The ingenuity of lawyers, aided by the disposition of judges to maintain the alienability of estates, succeeded in building up a fabric—the curious system of fines and recoveries—whereby B., who was said to have an *estate tail*, had practically all the power which he would have had independently of the Statute, and indeed the full power to alienate whether he had ever had issue of his own or not.

The total result, ultimately, of the Statute *De Donis* was to create an incumbrance on the *forms* of English conveyancing; and as there never was any similar Statute in Scotland, the forms of conveyance remained in this respect so much the simpler. It would perhaps be difficult, from purely Scotch sources, to find what was the effect given in early times to a 'simple destination,' i.e., where A. dispones the estate to B. and the heirs of his body, &c.; but, as the effect of such a destination at the present time is very similar to that described in the Statute *De Donis*, it may be fairly inferred that, from an early period in Scotch law, such a destination gave to B., when he acquired the estate in possession, the full power to 'alter the destination,' or dispose of the estate free from the ulterior limitations. If B. dies without altering the limitations, they take effect according to the terms of the original destination. Whether a disposition in favour of B., without mention of heirs, is to be construed as a gift for life only, or as a gift in fee, seems to have been, so late as the time of Sir Thomas Craig, who inclined to the English view, a questionable point. In modern Scotch law, such a gift is always construed as a disposition of the fee. It was never in Scotland (at least in modern times) considered essential, in order that B., being seised to him and the heirs of his body, should be able to alienate, that he should have or have had issue.

The attempt by Statute to create unalterable entails was in Scotland postponed to a much later period, and, when made, it was much more successful. In the meantime, the same object as that aimed at by the framers of the English Statute *De Donis*, had exercised the ingenuity of the lawyers of the great landowners; and the form of a deed of entail was gradually devised, which, after disponing the lands to the grantee and heirs in the order of succession desired, contained clauses expressly prohibiting the

successive grantees from (1) altering the order of succession, (2) selling or alienating, (3) contracting debt so that the estates might become liable to be adjudged to the creditors. Declaratory clauses were added, to the effect that all such acts should be null and void, and that on contravention of any of the prohibitions, the right of the contravenor should *ipso facto* be determined, and the succession devolve on the next heir. Doubts were entertained, as well they might be, whether these elaborate declarations in a private deed could have any effect against the general policy of the law in favour of freedom of alienation; but, ultimately, the landowners of the day had their wish, and by a Statute of the year 1685 it was enacted that, under certain conditions of publicity, deeds of entail which were properly 'fenced' by clauses of the above-mentioned nature, should receive effect. Under this statutory sanction the deed so elaborated became really operative. The limitations carefully framed for perpetuity received effect; and for more than a century and a half, until the 'Rutherford Act' of 1848, the landed gentry of Scotland enjoyed the distinction of a system of entails with an indefeasibility rivalling the Act of Union of the Medes and Persians.

Reverting to the legislation of Edward I., a very important Statute in the history of land tenure in England is that commonly known as *Quia Emptores* (18 Ed. I. stat. I. cap. I.). This Statute doubtless owed its origin to the influence of the large landowners, the same class as those who desired the power of effectually entailing their lands. The grievance complained of is, that purchasers of land have taken their tenements to be held in fee of their vendors, and not of the chief lords of the fees, whereby the chief lords have lost their escheats, marriages, and wardships. It was therefore enacted (by the first chapter of this Statute) that thenceforth it should be lawful to every freeman to sell his lands, but only on the terms, 'that the feoffee should hold them of the chief lord of the same fee, by such service or custom as his feoffee held before.' By the second chapter of the same Statute it was enacted, that if part only of the land was sold, the services should be apportioned, and, by the third chapter, that no feoffment should be made of lands held in fee simple to be held in mortmain.

Though passed by the influence of the same class of landowners, the Statute *Quia Emptores* had a very different fate from the Statute *De Donis*. The change introduced was consonant to public convenience. The multiplication of feudal tenures, with all their incidents of aids, reliefs, marriage, and wardship, was a growing evil, to which the Statute interposed a salutary check. It was also for the public benefit that the power of alienation should, once for

all, be freed from a restraint by the lord. At this point the whole system of conveyancing in Scotland parts company with the English system. In Scotland the consent of the superior to the alienation remained essential. It became customary, and in time obligatory, to give this consent upon payment of a sum fixed by a custom (confirmed by Statute) at a year's value of the lands. This liability to the 'composition on entry' remained a burden on the vassal's right; and, unless taxed (or fixed by agreement in the original charter) at a time when the value of the lands was relatively small, is a very serious burden. On the other hand, the vassal in Scotland retained the option[1], instead of alienating out and out, of creating a subordinate tenure in fee to be held of himself; and a perpetual tenure thus created is still the favourite mode of holding land for building purposes. It has the advantage, over the system of building leases prevailing in England, of preventing the accumulation of house property of enormous value in the same hands, and tends to widen the class of persons having permanent rights in the nature of immoveable property.

The legislative activity employed in England during the time of Edward I. has no counterpart in Scotch legal history. For the hundred years which followed the temporary subjection to Edward, the struggle for preservation of national existence leaves no time or inclination for legislation upon general questions of private right. It is enough that no right to land shall be recognised in those who live, no right transmitted by those who die otherwise than at the peace and faith of the king.

The constitution of Parliament in Scotland has never been favourable to legislation in the popular interest. Of Parliament, as an assembly in which there is any effective popular representation, the history in Scotland is a very brief one. In the notable Parliament of Cambuskenneth in 1326, we find, for the first time, all the estates of the realm, including the burgesses, in full Parliament assembled. This was the Parliament summoned by Robert Bruce to ask for a revenue to meet the expenses of the great war. The King acknowledged that, after spending his patrimony, he has only been able to sustain the burdens of the state by grievous and oppressive exactions, and asks the aid of the estates to find some

[1] The existence of this option led to some of the curious subtleties of Scotch conveyancing which existed within present memory. While the sub-tenure avoided the necessity of an immediate payment of composition, there might be also an advantage in holding directly of the superior; and the ingenuity of lawyers was much exercised in devising means whereby the number of entries payable to the superior should be minimised. Hence the mysteries of 'midsuperiority' and '*a me vel de me* holding,' by which a Scotch lawyer of the last generation might have maintained the credit of his country if challenged to produce anything equal to the English *recovery*, wherein the tenant to the *praecipe* 'vouched to warranty the said *B*, who on being vouched, vouched to warranty the common vouchee.'

modus vivendi for the future. The estates, earls, barons, burgesses, and freehold tenants (*libere tenentes*), whether holding mediately or immediately from the King, confirm the truth of the narrative, and acknowledge the justice of the requirement. They accordingly grant the King the tenth penny of revenue according to the 'old extent' made in the time of King Alexander the Third. The King, on the other hand, promises to make no more extraordinary exactions; and the concession of revenue is strictly limited to the lifetime of the King.

The constitution of Parliament has now become fixed, and the representation of the burgesses as well as the freehold tenants is an essential element in all subsequent Parliaments. It is not very long, however, before a radical change is made in the practice of the Parliament, which ultimately results in the delegation to a small Committee of the legislative functions of the body. The process begins in the year 1367, and in less than sixty years from that time, 'the Lords of the Articles' have become a Standing Committee to whom the entire work of legislation is delegated, the Estates formally meeting, from time to time, to pass in block the measures framed by the Committee. The result is an extremely neat and perspicuous body of Statute law, but one in which we need hardly look for the amendment, in the popular interest, of the general law relating to private rights.

Not less remarkable is the contract between the two countries, in the history of law as determined by judicial decision. The English Year Books furnish a unique record of a process whereby private right, no less than personal freedom, 'broadens slowly down from precedent to precedent.' In Scotland there is no similar record, and the chain of judicial decision is a broken one. The troubles ensuing upon the death (in 1329) of Robert Bruce, inaugurate a reign of 'unlaw' which lasted for near a century. Any attempt to trace, during this period, the history of Scotch legal institutions, is like groping in a darkness that may be felt. Towards the end of the fourteenth century, the state of misrule had become so intolerable, that the Estates (in 1398) took the matter in hand, and introduced some provisions for making the great officers of government responsible. It was not, however, until after the return, in 1824, of James I. of Scotland from captivity in England, that a serious attempt was made to reform the administration of justice. This monarch also appears to have entertained a project of legislation in the interest of the cultivators of the land; and in 1429—five years after his return—he obtained, doubtless with this object, a temporary Act for the suspension of arbitrary evictions. The Act, expressed in the brief and pithy language of

the legislation of the time, is as follows[1]:—*Item dominus Rex obtinuit per modum Requestus a prelatis et baronibus quod non removebunt pro anno futuro colonos nec husbandos a terris suis eiis alias*[2] *assedatis nisi domini illarum terrarum illas terras capiant ad usus suos proprios.* No sequel to this temporary Act is, however, to be found in this reign; and it may be surmised either that, on inquiry, no customs were ascertained to exist on which any rights in favour of the cultivators could be founded, or that the opposition encountered was too formidable for effective legislation. It was not until 1449—twenty years later and in the subsequent reign—that an Act was passed giving security of tenure to lessees under contracts in writing. This Act, to which I shall revert when I come to the important subject of leases or 'tacks,' still stands on the Statute-book as the sole provision of Scotch law to modify the absolute ownership of the *dominus* feudally seised of the land.

The only impression possible to form from the scanty materials relating to Scotch law at the close of the fourteenth and in the early part of the fifteenth century is, that any genuine Scotch customs relating to the occupation and humbler tenures of land had not only ceased to exist, but had lost the capacity of being revived. The bad feeling amongst the feudal magnates which led to the violent death (in 1436) of James I. has been ascribed[3], amongst other causes, to the legal and parliamentary practices brought with him from England, favouring the protection of the rights of the humble classes, and tending to check the abuses of feudal power. It seems not unlikely that his efforts in the direction of specific legislation for the benefit of the cultivators contributed to intensify this feeling, and to inspire and encourage the authors of a tragedy which here stands out in glaring colours from an obscure page of history.

A modern parallel to the condition of land tenure in Scotland at the time of the return of James I. (in 1424) is furnished by the condition of Oudh (in India) just before its annexation by Lord Dalhousie in 1856. The misrule of the country under the Nawab, which excused, and perhaps in this instance, justified the measure of annexation, was probably not unlike that which led to the action of the Scotch Estates in 1398. The position of the great talookdars in Oudh corresponded almost exactly with that of the great feudal landowners of this period in Scotland; and the difficulties which surrounded James I. in his endeavours to benefit

[1] Act. Parl. (Thomson's), vol. ii. p. 17.

[2] The words here are written eiis ats. I am indebted to Mr. Thomas Dickson, of the Historical Department of the Register House, for the explanation that they are to read 'eis alias'—*alias* being used as equivalent to '*prius*.'

[3] Burton, Hist. of Scotland, iii. 116.

the humbler classes of his subjects may perhaps be fairly realized by a perusal of Mr. Bosworth Smith's description[1] of the circumstances which thwarted Lord Lawrence in his efforts to find a *locus standi* for the cultivators and humble classes of tenure-holders in Oudh. It was ultimately found on inquiry that the great talookdars were the only persons who, in recent times, could be recognised as having enjoyed any kind of property in the land; and that all subordinate rights had been, in effect, swept away by the acts of violence which had been the order of the day under the Nawabs. In Oudh the process had been simplified by Lord Canning's policy after the Mutiny, which made *tabulæ rasæ* by confiscation and regrant of the land to the great talookdars. The same result was not less effectually achieved in Scotland by the course of events, which gradually eliminated all customary rights, and established the absolute dominum of the feudal grantees (mediate or immediate) of the Crown.

In the absence of either controlling legislation or ruling precedent, the field had remained open for the ingenuity and industry of lawyers to build up a fabric which might at once fortify the rights of their employers, and provide for themselves occupation in keeping the fabric in repair. I have already shown that the feudal lawyer must have closely followed on the steps of the Norman adventurers and their territorial acquisitions. His craft was doubtless exercised in the elaborate pleadings of the various claimants for the Crown of Scotland submitted to the arbitration of Edward. His hand is seen in the charters granted by Robert I.; and he doubtless found employment from the disinherited barons who, with Edward Balliol, had a brief tenure of power during the minority of David II. Henceforth he continues to exert a subtle influence which flourishes in proportion to the want of a strong and popular legislative authority. Besides the traditions received from his predecessors in the craft, he was probably furnished with a knowledge of some scraps of Justinian's Code and Digest; but his chief oracles were the *Libri Feudorum*, compiled in North Italy under the direction of Barbarossa, and appended, as a sort of apocrypha, to the canonical books of the Roman Law.

Of the books of law considered to be of genuine Scotch origin, it would have been difficult for a lawyer of the fifteenth century to give any intelligible account. Collections of laws and styles there were, regarded as having some kind of ill-defined authority. Of these the most celebrated is the 'Regiam Majestatem,' long thought

[1] Life of Lord Lawrence, vol. ii. p. 360. I am informed by Lord Ripon that the *status* of the cultivators in Oudh came under the consideration of the Government of India while he was at its head, but that no final decision had been come to when he left India.

to have been a genuine ancient Scottish law-book, until a tardy criticism showed it to be a mere transcript of Glanville's Treatise 'De legibus Angliae' with some variations and interpolations. It is, nevertheless, historically valuable as showing the approximation as well as some of the differences, between the legal systems (in the early part of the thirteenth century) of the two countries.

In the prevailing ignorance as to the sources of law, and the readiness with which anything purporting to be a written book of the law was accepted as authoritative, it is not surprising that a clumsy forgery should have escaped ready and certain detection. To the latter part of the fourteenth century may be attributed the so-called 'laws of Malcolm M^c^Kenneth,' purporting to belong to the date 1004–1034. According to the statement of the opening chapter of these laws, the whole land of the country, assumed to have been in the *plenum dominum* of the King, was granted away to his subjects. It is, of course, unnecessary in the present day to prove that such a statement could not possibly have been made by the authors of a contemporary document relating to this period. But the circumstance that these 'laws' should have been admitted, in the end of the fourteenth century, to a place in the received collections, is a trait significant of a time when the occupier or tenant of an unfeudalized holding had been reduced, practically and literally, to the condition of a tenant at will.

In short, the circumstances of Scotland towards the end of the fourteenth century are exceptionally favourable to the pretension of great landholders—which everywhere and at all periods tends to assert itself in the absence of countervailing checks—to be absolute owners of the soil. It is the same pretension which is exemplified in England in the common style of manorial records, where it became the practice, in recording the tenure, to insert the express declaration that the tenement is to be held *at the will of the lord*. The result is a striking example of the power of custom in England to prevail against what is technically called 'law.' The 'law' recognised the express condition in so far that the copy-holder was held not entitled to the King's *writ of right*[1]; and therefore has been said to have but an *estate at will according to the course of the Common Law*. But his customary right was very early acknowledged as capable of being enforced—indeed there is no reason to believe that these customary tenants were ever (unless in times of practical anarchy) without remedy against the usurpation of the lord;—and in the time of Edward IV. it was laid down by the judges that the copy-holder doing his custom and services, if he is put out by the lord, shall have an action of trespass against him[2].

[1] Co. Litt. 60 a. [2] Ibid. 61 a.

To the absolute dominion of the feudal owner in Scotland there came to be one compensating influence, whose beginnings may be traced—perhaps were in some measure owing—to the miserable condition to which the country had been reduced during the War of Independence. An inevitable result of the protracted misery of this war must have been that large tracts of land were suffered to go out of cultivation; and it may have been the consequence of a comparative return to peace that cultivators were enabled sometimes to make a better bargain than the conditions of the old *status* of villeinage. A commercial spirit began to form itself, under which land was 'set' to tenants under tacks (or contracts in writing by way of lease), and it seems probable that, under this system, cultivation was extended over a large area of land which either had fallen out of cultivation or had never previously been cultivated. The earliest document in the form of a lease known to the late Professor Innes[1] was a contract relating to an extensive tract of land, between the Abbot of Scone and the Hays of Leys. The date is 1312—two years before Bannockburn—and the term is thirty years. The position of the lessees was that of middlemen engaging for the rent and for services—military service to be rendered by themselves, and various dues to be rendered by the *husbandi* who would hold under them as the actual cultivators of the soil. This document gives indications of existing usages—such as that the men dwelling on the land have fuel from the common for their own use only—exactly similar to those which, in England have frequently (by the aid of the fiction of a lost charter of incorporation) become established as legal rights in favour of a class. Within a short time from the date of the lease just referred to, the practice of 'setting' lands by contract (*assedatio*) for a term of years or for life became not infrequent. The early leases of which evidence has been preserved, are chiefly those made by the great religious houses, who have preserved a record of such transactions. It is probable indeed that they were the pioneers in this mode of encouraging cultivation. Sometimes the tenancy is a beneficial one—for life—by way of reward for military service[2]. Sometimes it is by way of an improving lease, as when the monks of Arbroath let certain lands to two joint tenants for a term of five years for a yearly rent of forty shillings, and subject to the obligation to build during the first year a barn and a byre[3]. At what time the practice of setting lands by lease to the actual cultivators became general it would be difficult to say, but it is clear from the

[1] Scotch Legal Antiquities, p. 248.
[2] *Registrum de* Aberbrothoc (Bannatyne Club), No. 330, p. 284.
[3] Ibid., No. 352, p. 309.

preamble of the Statute of James II. (1449) above referred to, that this had then become the normal condition of Scottish husbandry.

The Statute of 1449 is as follows:—'It is ordained for the safety and favour of the poor people that labour the ground that they and all others that have taken or shall take land in time to come from lords and have terms and years thereof, that supposing the lords sell or alienate the land, the takers shall remain with their tacks on to the ish (or end) of their terms into whose hands soever the lands come, for sic like mail (or rent) as they took them for.'

This Act proves, by way of contrast, how insecure must have been the position of the general body of cultivators at the time of its enactment. Struggles were made to defeat its provisions by indirect methods of conveyance; but at length the security of the lessee (having a tack or lease in writing) was established against every form of alienation by the lessor. In competition, however, with the superior of the lessor, the lease was still ineffectual; and consequently, when there was a minor heir to the property, the superior, in right of his wardship, might bring in a new tenant[1]. It accordingly became the rule, as stated by Lord Stair, that 'tacks sleep during wardship;' and this lasted until the abolition of wardship, with the other incidents of military tenure, by the Act of 1747 (20 Geo. II. c. 50), after the Jacobite rising of 1745. To this Act I shall refer in a concluding article, in which I hope to bring the sketch of Scotch tenure up to the present time; and to make some remarks in relation to what is called the 'Crofter question.'

R. CAMPBELL.

[1] *Robert Maitland of Queensbury* v. *William of Douglas of Drumlaurig*, Acta Auditorum, 16 Oct. 1483.

ON A POINT IN THE LAW OF EXECUTORY LIMITATIONS.

IT has never, I believe, been suggested that, so far as dealings with the freehold and inheritance of lands are concerned, there is any difference between executory limitations contained in a deed and executory devises; in the sense that anything can be done by the one method which could not, by the use of apt language, have been equally well done by the other. But since the rules governing the interpretation of deeds are not identical with those governing the interpretation of wills, it does not follow that the effect of a limitation contained in a deed must always be the same as the effect of the same limitation contained in a will. So far, for example, as these rules require in a deed greater strictness in the use of words to limit estates of inheritance, deeds will of course differ from wills in respect to executory limitations amounting to the *quantum* of a fee. And equally of course, in respect to all questions of verbal construction, where there is any difference between deeds and wills, there is nothing to exempt executory limitations from any rules which are applicable to limitations in general.

Moreover, it is possible that, by reason of the difference between the mode of the operation of a will and the mode of the operation of a deed, a limitation which would have been good in a will may be void in a deed; and it is equally possible, that a limitation which would have been good and effectual in a deed, may be void, or ineffectual, in a will. Thus a grant contained in a deed may be indefeasibly good, while a similar devise in a will is liable to be defeated during the testator's lifetime, though the will remains unrevoked, by a subsequent grant made by deed. In so far as executory limitations fall under these principles in common with all other limitations, they are of course liable to the same practical consequences. Whether there are any principles peculiar to executory limitations, introducing into them alone a distinction of this nature, whereby it comes to pass that an executory devise in a will may under peculiar circumstances be good, while the same limitation would under the same circumstances, if it had been contained in a deed, have been bad, may be a question of difficulty; though reported cases are not wanting in which this question has been answered in the affirmative, or in which the affirmative answer to this question has been tacitly assumed.

The doctrine, that executory limitations, whether in a deed or in a will, are not subject to the strictness of the rules relating to common law assurances, which were designed to prevent the abeyance of the seisin by act of parties, does not mean, that it is lawful by an executory limitation to cause an abeyance of the seisin, but, that the mode of the operation of the assurances under which executory limitations may arise is such, that by their means an abeyance of the seisin is not caused, under circumstances which would have caused an abeyance of the seisin if the assurance had been a common law assurance. The abeyance in the one case is no more lawful than in the other; but in the one case it (by construction of law) does happen (or rather, would happen, if the limitation were allowed to take effect), and in the other case it does not. It follows, that if any peculiar form of executory limitation could be devised, whereby, if it were allowed to be valid, an abeyance of the seisin would be caused, such an executory limitation would be void, no less than a similar limitation if contained in an assurance made at the common law. And if it is the fact that there exists any peculiar form of limitation, which is such that in a conveyance to uses it would cause an abeyance of the seisin, while in a will it would not, it will follow that a given limitation made by way of executory devise may by possibility be good, while the same limitation, if made by way of springing or shifting use, would be void. It therefore becomes necessary to enquire into the grounds upon which executory limitations can claim exemption from the rules governing limitations contained in common law assurances; which are commonly referred to as the rules forbidding the creation of a freehold *in futuro*.

A freehold *in futuro* would be created, whenever, in an assurance taking effect at the common law, an estate of freehold is limited to commence after the expiration of a definite interval of time, or upon the happening of any specified event or contingency, other than the natural expiration of a precedent estate of freehold. Therefore, in the case of executory limitations which purport to create what, in a common law assurance, would be a freehold *in futuro*, the question arises, What becomes of the seisin during the unappropriated interval, or until the happening of the specified event or contingency?

To this question it is impossible to give the same reply in the case of executory limitations contained in a deed, as in the case of executory devises; because at the time when the deed takes effect the settlor is necessarily alive, while at the time when the will takes effect he is necessarily dead. It is a well recognised principle of law, that whatever interest, whether partial or total, and whether land or profits, in real estate, of which a testator fails to dispose effectually by his will, descends to the heir. Upon this point the

law is so fixed, that the clearest expression by the testator of an intention that the heir shall not succeed, will be of no avail, unless the property is effectually given by the will to somebody else; and even an express trust for conversion will be no obstacle to the title of the heir, unless the proceeds of the conversion are effectually given to some other person. (*Fitch* v. *Weber*, 6 Ha. 145; *Re Cameron, Nixon* v. *Cameron*, 26 Ch. D. 19.) In the case, therefore, of executory devises, the reply to the question above asked is easy; namely, that during the unappropriated interval, or until the happening of the contingency, the freehold descends upon the heir. (*Pay's Case*, Cro. Eliz. 878.) Since the time when executory limitations succeeded in forcing their way into the law, no doubt has been thrown upon the sufficiency of this explanation, in respect to executory devises.

It is a not less well-ascertained rule of the modern law, that upon any assurance of lands made without consideration, the use results to the grantor or settlor. (Co. Litt. 23 a; and see on sect. 463.) Before the Statute of *Quia Emptores*, indeed, the use would not have resulted to the feoffor upon a feoffment in fee simple made without (express) consideration; because the tenure, which the law implied, and by which the feoffee held of the feoffor, would have constituted in the eye of the law a sufficient consideration. After the passing of the last-mentioned statute, no such tenure could be created by a subject, and the use in fee simple would have resulted to the grantor for want of consideration. This resulting of the use originally gave rise to a trust in favour of the grantor; but since the passing of the Statute of Uses, the resulting use, by virtue of that statute, has carried back with it to the grantor the legal estate. This doctrine of the resulting of the use was applied as well to particular estates carved out of the use, as to the complete use in fee; and if A., without any consideration, had enfeoffed B. and his heirs, to the use, from and after the death of A., of C. and his heirs, the use during the life of A., being undisposed of, would have resulted to A., carrying with it the legal estate for his life. By such a feoffment, through the operation of the Statute of Uses, A. became tenant for his own life, the remainder in fee to C. Of course nothing hindered him from expressly limiting the use to himself for life; for any result which may be brought about by means of a presumed intention, may *à fortiori* be brought about by means of an expressed intention. He could not, before the statute, have effected this purpose by a single feoffment made at the common law; for if he had attempted to enfeoff C. directly in fee simple in remainder upon his (the feoffor's) own life, the feoffment would have been void, both as to the estate for life, because the feoffor cannot retain in himself the immediate seisin after a feoffment, and also as to the remainder,

because that would have been an attempt to create a freehold *in futuro*. But by means of the feoffment to uses above described, the desired result was attained without objection. The whole seisin in fee simple departed out of the feoffor into the feoffee to uses; and the whole use in fee simple, partly as a resulting use, and partly as a declared use, was by the statute transmuted into a perfectly unobjectionable succession of legal estates.

Thus it appears that, after the Statute of Uses, a limitation by way of use, which would have been void as a limitation at the common law, as being an attempt to create a freehold *in futuro*, might be valid, and might, by virtue of the statute, give rise to a legal estate having a corresponding *quantum*. These considerations are the foundation of the existence of *springing uses*: which term is used to denote those uses, capable of being executed into legal estates by the statute, which differ from strict legal limitations only in what may be styled the irregularity of their commencement in point of time. It was observed that the use undisposed of resulted to the grantor, and that the combination of this with the declared use, effectually obviated all danger of any abeyance of the seisin. This was the reply given to the above-stated question, relating to the abeyance of the seisin, so far as springing uses are concerned.

In the case above supposed, and generally in cases of springing uses, it is so obvious that the part of the use undisposed of must result to the grantor, that there seems to be some absurdity in asking the question, What would be the consequence, if this partial use did *not* result? The first impression in the reader's mind might not impossibly be, that no case can be specified, where the assurance is wholly voluntary, in which the part of the use undisposed of will not result to the settlor; and Butler would rather seem to have held this opinion. If, however, we do ask the question, the natural reply would seem to be, that whenever this part of the use cannot result to the settlor, it will remain in the feoffee or grantee to uses; who therefore remains seised of the conterminous legal estate, which serves precisely the same useful purposes in his hands, that it would have served in the hands of the settlor, if the use had resulted to him. Obvious as this reply must seem, it is certain that a totally different one has been given in more than one reported case. It has been held that, where the peculiar circumstances forbade (as the Court thought) the hypothesis of the resulting of the use, the subsequent use was void, as being an attempt to create a freehold *in futuro*.

In the case of *Adams* v. *Terre-tenants of Savage*, 2 Salk. 679, more fully reported in Ld. Raym. 854, the case was as follows:—A settlor conveyed lands by lease and release to trustees and their heirs, to

the use of himself for ninety-nine years, remainder to the use of the trustees for twenty-five years, remainder to the heirs male of his own body, remainder to his own right heirs. The Court of Queen's Bench held that the limitation in tail male was void, because no precedent estate of freehold was limited to support it. They held that such an estate could not, under the circumstances of the case, be implied; that is, that under the circumstances there could be no resulting use to the settlor for his life.

The grounds upon which they arrived at the latter conclusion are by no means clearly stated. Fearne apparently assumes the ground to have been, that a resulting use for life cannot be allowed, when an actual use for years is expressly limited to the same person. (Fearne, Cont. Rem. 42.) It is at all events clear, from Butler's note, that he understood this to be Fearne's meaning. This view agrees very well with the language of Powell; but very ill with that of Lord Holt. The latter is reported to have said that 'where . . . . upon a conveyance, such uses are limited as, *supposing the limitations to be good, would pass the whole estate*, there no use will result contrary to the express limitations of the party' (Ld. Raym. 855). This seems to mean that, whereas a contingent remainder in tail male expectant upon a term of years, followed by a remainder in fee simple, would, if allowed to be good, exhaust the whole fee, no resulting use remains for the benefit of the settlor; because, if he is taken at his word, he has disposed of the whole fee, and it is only by refusing to take him at his word,—that is, by refusing to give effect to his settlement, and declaring it bad,—that any question of a resulting use can be supposed to arise, for the purpose of making it good. Holt seems to found his conclusion upon this contradiction in terms. But Powell seems to have founded it upon the quite different view stated by Fearne, namely, that where a man has expressly taken a term of years, he must be understood to have declined to take an estate for life; which view proceeds partly upon the maxim, *expressio unius est exclusio alterius*, and partly upon the consideration that the estate for life might destroy the term of years by merger. Powell's very remarkable criticisms upon the earlier case of *Pybus* or *Pibus* v. *Mitford*, 2 Lev. 75, 1 Vent. 372, which were made by way of distinguishing that case from *Adams* v. *Savage*, leave hardly any doubt that this was his meaning. These criticisms will be considered presently.

It was one of the old traditions of Westminster Hall, as I have been informed upon excellent authority, that when Holt and Powell concurred in opinion, their decision was pretty certain to be right. But I humbly submit that perhaps the benefit of this maxim does not extend to cases in which, though they agreed in pronouncing the

same decision, they differed *toto cœlo* in the reasons upon which they founded it. This is a kind of agreement in which the weight of concurrent opinions does not seem to be obviously cumulative.

The case of *Rawley* v. *Holland*, as reported in 22 Vin. Abr. 189, *Uses*, F., pl. 11, and 2 Eq. Abr. 753, clearly supports the interpretation put by Fearne upon *Adams* v. *Savage*. A settlor limited lands to the use of himself for ninety-nine years if he should so long live, with remainder to trustees for two hundred years, with remainder to the use of the heirs male of his own body, with remainder to the use of his own right heirs. Both in Chancery, and in the Common Pleas upon a Case sent there from Chancery, it was held that the limitation in tail male was void; and precisely upon the reasoning alleged by Fearne, namely, that in order to its validity a precedent use of the *quantum* of a freehold must be supposed to result to the settlor, and that this supposition was incompatible with the express limitation to him of a term of years. But the Master of the Rolls is reported to have said, 'that to talk of raising an use by implication, was a mystery in law which he did not understand:' a remark which throws great doubt either upon the accuracy of the report, or upon the sobriety of his judgment.

Lastly (but not last in order of time) there is the case of *Davis* or *Davies* v. *Speed*, 4 Mod. 153, 12 Mod. 38, 2 Salk. 675, Carth. 262, Holt, 730, Skin. 351, aff. in *Dom. Proc.*, Show. P. C. 104. In this case a husband and wife covenanted to levy a fine of the wife's lands, to the use of the heirs of the body of the husband on the wife begotten, remainder to the right heirs of the husband. They had issue; and the wife died first, then the issue, and lastly the husband. It was held that the limitation to the right heirs (Salkeld absurdly says, the heirs *of the body*, who were already defunct) of the husband was void. But it is not true that this decision was founded upon the doctrine, that a resulting use of freehold in the settlor, precedent to a springing use, is necessary to the validity of the springing use. It is true, the Court remarked, that there could in this case be no such use: because the only use which would have served the supposed purpose, was a resulting use to the husband; and there could be no such resulting use in him, for the conclusive reason, that he was not the settlor; while a resulting use to the wife would not suffice, since she died in the husband's lifetime, before the springing use (to his right heirs) could arise. But an attentive examination of the reports will show that the argument was not thus advanced *simpliciter*, but by way[1] of

[1] 'For taking it as a remainder, there is no precedent estate of freehold to support it; and if you take it as a springing use, then it is . . . to arise after a dying without issue.' (Holt, 730.)

alternative. *Either*, they said, the limitation to the right heirs is a contingent remainder, *or else* it is a springing use: upon the former alternative, it is void *for want of a precedent freehold* to support it; while upon the latter alternative, though no precedent freehold is needed to support it, it is void *for remoteness*, because it is limited to arise after a general failure of issue of the body of the husband by the wife. This reasoning plainly imports, what nobody doubts, that (at common law) every contingent remainder must be supported by a precedent freehold; but it imports no such thing with respect to springing uses, or executory limitations in general. With regard to them it imports only, what also nobody doubts, that they must conform to the rule against perpetuities. Holt seems plainly to have thought that, apart from the question of remoteness, there was no objection against the limitation.

Therefore if the doctrine in question, that a resulting use to the settlor is necessary (in the kind of cases we are considering) to the validity of a springing use, is to be supported, it must be rested upon the cases only of *Adams* v. *Savage*, and *Rawley* v. *Holland*. It appears that the case of *Davies* v. *Speed* will by no means serve the turn; nor am I acquainted with any other that, when rightly examined, appears to be truly in point.

If this doctrine, that a springing use of freehold, not preceded and supported by another *express* use of freehold, is void whenever there cannot be a *resulting* use of freehold to the settlor, is sound, and if it is also true that the express limitation of a term of years to the settlor will, *in a deed*, preclude him from taking any further or other interest by way of resulting use: then it seems to follow that there is, in this respect, a distinction between a springing use arising under a deed, and an executory devise arising under a will. For it is impossible to doubt that the limitations which were pronounced to be bad in *Adams* v. *Savage* and *Rawley* v. *Holland*, would have been held good, if, being couched in exactly the same words, they had been contained in a will. The intermediate freehold would have been held to pass to the testator's heir at law. It is true that the point has never, so far as I am aware, been expressly decided; for the case of *Harris* v. *Barnes*, 4 Burr. 2157, the nearest case with which I am acquainted where the question related to an executory devise, the circumstances, though in all respects but one tallying closely with those of *Adams* v. *Savage* and *Rawley* v. *Holland*, differed in one important particular. The devise of the term of years was not made *to the heir*, to whom the unappropriated freehold was in the meantime to descend; and this was needed to make the analogy quite complete. But it must be conceded, that this distinction cannot be supposed to make any difference. At the most, it could

only affect the question, whether the testator did, or did not intend, that his heir at law should inherit any fraction of the realty of which the will did not otherwise dispose; and, as above remarked, the mere intention, or desire, of the testator, when he fails to give effect to it by an actual disposition of the property, in no way affects the rights of the heir at law.

Let us therefore enquire whether, and why, the Court, when they held in those cases that the use and with it the legal estate could not result to the settlor, meant also to deny that it could remain in the feoffees or releasees to uses. Suppose it to be well established law, that an express limitation of the use of a term of years to a settlor, will prevent his also taking an estate for his own life by way of resulting use, why should this have any further or other effect, than simply to leave the use where it is, namely in the feoffees to uses? The Court can hardly have thought that this effect followed; because, if they did, it was strongly incumbent upon them to give some reason why the seisin in the hands of the feoffees would not have served to prevent an abeyance of the freehold, just as well as if it had been in the hands of the settlor. They do not appear consciously to have entertained the question. It would rather seem, that they jumped, without any consideration, from their first conclusion, that the seisin could not result to the settlor, to the further conclusion, that it therefore could not be anywhere at all. And they seem to have held this latter opinion in a very vague and confused manner; and not at all to have adverted to its extraordinary implication, that a failure to result is equivalent to annihilation.

Much light is thrown upon this confusion of mind by Powell's criticisms in *Adams* v. *Savage* upon the case of *Pybus* or *Pibus* v. *Mitford*, 2 Lev. 75, 1 Vent. 372. In the last-mentioned case, a settlor, seised in fee simple, by indenture covenanted to stand seised, *immediately after the date of the indenture*, to the uses of the indenture *and to no other uses*; namely (so far as the lands in question were concerned) to the use of the heirs males of his own body by his (second) wife, with remainder to his own right heirs. It might be thought that, if any declaration of intention could possibly have prevented him from taking, or rather, retaining, an estate for his own life, the words in italics might have sufficed for this purpose. But it was decided, that he had an estate for life, which, of course, by the Rule in Shelley's Case, coalesced with the limitation to the heirs males, and gave him an estate in special tail male. Now Powell, in *Adams* v. *Savage*, being minded to hold that there the settlor could take no estate by resulting use, apparently thought it necessary to distinguish the case from *Pybus* v. *Mitford*.

'And therefore, by him [Powell], if there had been an express limitation in the case of *Pybus* v. *Midford*, limited to the covenantor, the judgment would have been otherwise.' (Ld. Raym. at p. 855.) Salkeld's account is to the same effect:—'And yet, per *Powel*, J., even in that case [meaning *Pybus* v. *Mitford*, erroneously cited under a wrong name] if there had been an express estate limited to the covenantor, it had been otherwise.' (2 Salk. at p. 680.) Powell, therefore, is reported to have thought, that if a settlor, seised in fee simple, should covenant to stand seised to the use of himself for ninety-nine years, if he should so long live, with remainder to the heirs males of his own body, this remainder would be void, for want of a precedent freehold to support it. He seems to have tacitly assumed, that the covenantor would somehow or another have deprived himself of his own freehold, by stipulating for a term of years.

If feoffees (using that word generally, to include also releasees, conusees, grantees, and so forth) have a legal estate, not acquired for valuable consideration, upon which uses may be declared, they are liable to be deprived of that estate, either by the declaration of a use, or by the resulting of a use. But why, I repeat, should they be deprived of it, in cases where, by hypothesis, the use neither is declared, nor can result? When this question is once stated plainly, it is seen to be one which is likely to remain for a long time without any very plain answer.

Whether anybody will be found to suggest, that in *Adams* v. *Savage* and *Rawley* v. *Holland*, the Court thought that the disputed estate for life *did* reside in the feoffees to uses, but that it did not, in their hands, suffice, as it would have sufficed in the hands of the settlor, to support the subsequent limitations, I do not know. It will be time enough to deal with this suggestion, if ever it should be made. The reports contain no hint that the Court entertained any such opinion.

Dicta of eminent persons are not wanting, which would seem to favour the opinion, that when the use undisposed of cannot result to the settlor, it perishes absolutely, and with it the concomitant legal estate. 'Before the Statute of Uses, if there had been a feoffment to the use of A. for years, remainder (of the use) in contingency, the contingent use would have been good, for the feoffees remained tenants of the legal freehold; but since that statute it is otherwise, *for now no estate remains in the feoffees.*' (Fearne, Cont. Rem. 284.) But compare with this the following remark by Butler:—'However, it is to be observed, that in cases of wills, uses, and trusts, if it be inconsistent with the uses *expressly* declared, that the freehold should remain with the party (as if he has a term of years expressly given him), the law will not give him, by

implication, an estate of freehold, *if, consistently with the rules of law, it can be considered to reside elsewhere.*' (Butl. n. 2 on Co. Litt. 216a.) The authors of these two passages cannot possibly have meant to say the same thing. The latter approaches nearly to a flat contradiction of the former. Yet it is certain that Butler had no idea that he was contradicting Fearne; he would otherwise, in a note to the latter's text, have offered elaborate apologies, explanations, or perhaps retractations: an oversight which is the index to the utter confusion which has from the beginning enveloped this subject. Butler, moreover, in support of his proposition cites the cases of *Pybus* v. *Mitford*, *Adams* v. *Savage*, *Penhay* v. *Hurrell*, and *Davies* v. *Speed*; though hardly anything could be more absurd than to lump all these cases together, as if they could possibly be said to prove any one thing among them.

Of course there is a very obvious and indisputably true meaning which Fearne's words might by possibility bear: he might only have meant to say, that when the declared uses exhaust the whole fee, no use, and no estate, is left in the feoffees. Unfortunately, this innocent meaning fits in very ill with his context, and with the fact that he immediately cites *Adams* v. *Savage*. It is rather to be feared that he may have meant (in a vague sort of way) what is above attributed to him. But if, and in so far as, he did mean this, it appears to be one of the most purely gratuitous opinions ever entertained by any mortal. There is not a syllable in the language of the Statute of Uses to suggest, that it intended to devest any seisin out of the feoffees, except when somebody else is entitled to the corresponding use. Anybody might as reasonably pretend, that the statute renders void all feoffments made to a feoffee whose name begins with an F, or who is less than forty years old. And in *Chudleigh's Case*, 1 Rep. 120, at p. 136, it was expressly decided 'by Baron Ewens, Owen, Beamond, Fenner, Clark, Clench, the Lord Anderson, and Popham, Lord Chief Justice,' that the statute '*doth not devest any estate out of the feoffees, but when it can be executed in the cest'que use.*'

It is not probable that Fearne would advisedly have maintained any proposition in contravention of the last-cited authority. He seems to have been puzzled; and he evidently was not at all happy in his mind about the case of *Adams* v. *Savage*. Immediately after the above-cited passage about no estate being left in the feoffees, he cites that case, and proceeds to comment upon it in the following words:—'The question in this case is stated to have been, whether A. was tenant in tail or only tenant for years. Now the latter conclusion must have prevailed, [granting that no use could result to the settlor,] even if the limitation to the heirs male of his body,

though void as a remainder, had been admitted effectual as a future use within the reason of the cases put by Holt,' in *Davis* v. *Speed*, 12 Mod. 38 at p. 39. (Fearne, Cont. Rem. 284.) This is equivalent to saying, (1) that he is not satisfied with the decision, so far as it pronounced the limitation in question to be void; and (2) that this part of the decision may be doubted, without at all doubting that A. took no estate for life, and consequently that the limitation to the heirs male of his body *did not, by virtue of the Rule in Shelley's Case, give an estate in tail male to A.* He had originally cited the case (at p. 42) as an illustration of *the necessity for an estate of freehold in the ancestor*, in order to the operation of the Rule in Shelley's Case; and he seems, at p. 284, to be consoling himself with the reflection, that the case may be a good authority for this purpose, and that the want of a resulting use to the ancestor really has this effect, whether the Court were right or wrong in thinking that it also had the further effect, of making the limitation in tail male void.

Hereby hangs a further tale of perplexity and confusion. The reader will have observed that the decision in *Adams* v. *Savage* consists of two separate parts: (1) that there was no resulting use to the settlor; and (2) that the subsequent limitation in tail male was void. It is quite possible to deny the second part, without at all doubting the first part; but it is absolutely impossible to deny the first part without also denying the second.

Now hear Butler. 'With great deference to these authorities [*Adams* v. *Savage* and *Rawley* v. *Holland*], and Mr. Fearne's conclusion from them, it must be considered, that in each of them, the freehold resulted to the ancestor *by a necessary consequence of law*. [The italics, here and elsewhere, are mine.] It is a rule of law which admits of no exception, that the freehold cannot be in abeyance; it may therefore be inquired, in whom, in the cited cases, it was considered to reside. It is evident that it could only reside in the ancestor or in the trustees. Now *as the judges held the limitation to the heirs of the ancestor's body to be void, they could not consider the freehold to reside in the trustees.* It must therefore *be considered to be vested in the ancestor;* and it cannot be a legal objection to this conclusion, that it destroyed the term.' (Butl. note *y* on Fearne, Cont. Rem. 41.) Butler does not seem quite to be aware how utterly his argument destroys the cases cited upon both points. He evidently thought (and I humbly agree with him) that if the freehold had been allowed to remain in the feoffees, this would have sufficed to support the subsequent limitation. But whether this is, or is not, absolutely clear, one point at all events is absolutely clear; namely, that if the freehold had been allowed to result to the settlor, this would have sufficed for the purpose. Holt and Powell could not agree as to why

the freehold did not result, but neither of them had the faintest doubt that, if it had resulted, this would have supported the subsequent limitation. It is possible to contend, that though the freehold did not result, yet it remained in the feoffees, and in their hands sufficed to support the subsequent limitation: which contention leaves the cases in possession of one half of their ruling, namely, as to the failure of the use to result. But it is quite impossible to contend that the use did result to the settlor, and yet that the cases were right in deciding, that the subsequent limitation was void for want of a supporting freehold.

In another part of the same note, Butler shows some disposition to suggest, but in a very vague and faltering way, that perhaps the Court took the subsequent limitation to be a contingent remainder properly so called, not a springing use at all, and grounded their decision upon this view. If he did mean to say this, it is inconsistent with what he says afterwards; plainly implying, that, even upon this hypothesis, a freehold in the trustees would have supported the remainder. For when he said, or implied, that this consequence followed, he must have meant to say, that it followed *upon the hypothesis, whatever it was, of the judges themselves;* for otherwise his remark would have no point or sense in it. But a detailed examination would, I think, show beyond dispute, that this supposition affords no explanation at all of the decision. It is quite true that a contingent remainder, whether created by way of use or at common law, is equally destroyed (at common law) by the determination of the precedent freehold before the vesting of the remainder. But this affords no argument in favour of the disputed cases. Though a freehold once and for all executed by the statute may not result to the feoffees, that is no reason why a freehold, which has never been executed by the statute at all, should not remain in them.

In truth, to say that in *Adams* v. *Savage*, and *Rawley* v. *Holland*, the Court thought that the disputed limitation was a contingent remainder properly so called, and not a springing use, is the same thing as to say, that at the date when those cases were decided, the existence of springing uses was not recognised by the Courts; or at least, that it was not recognised so clearly, but that the Courts might get completely confused between the idea of a springing use and the idea of a contingent remainder. And something very like this conclusion seems to have been the opinion of Sanders. (1 Sand. Uses, 147, 148.)

But the precise point in question was explicitly raised, though not decided, in the *Earl of Bedford's Case*, or *Bedford* v. *Russell*, Moor. 718, Poph. 3. In 4 Eliz. the Earl made a feoffment to the use of himself for forty years, remainder to his eldest son in tail male, remainder to his

second son in tail male, remainder to his own right heirs. His eldest son having died leaving only daughters, and his second son having died without issue, the Earl made a fresh settlement, to the use of himself for life, with remainder to his third and eldest surviving son in tail male, with divers remainders over. After the Earl's death, the question arose, whether the daughters of the eldest son, who were the heirs general of the Earl, were entitled, under the limitation to his right heirs in the first settlement, or whether the third son was entitled under the limitation to him in tail male in the second settlement. Judgment was given for the son, upon two separate grounds; of which the second (according to Popham the principal) ground was, that by the death of the second son in the Earl's lifetime, without issue, the remainder to the right heirs (assuming that a settlor might limit such an estate to his own right heirs) failed, because the determination of the estate tail had deprived it of the precedent freehold which was necessary to its support[1]. The counsel who argued in favour of the validity of the limitation, though they admitted that in an assurance made at the common law it would have failed, for the reason alleged, urged that, in an assurance under the Statute of Uses, this was no objection against its validity, because *in the meantime the seisin was in the feoffees to uses*[2].

Fearne (Cont. Rem. 51) cites the *Earl of Bedford's Case* only with reference to the other point; namely, that what purported to be a remainder to the right heirs was not really a remainder, but a reversion. This opens a totally different branch of learning, into which it is impossible to enter here, and which is not relevant to the present discussion.

More might be said, if space permitted it. Enough has perhaps been said to show that, if ever any cases deserved to be pronounced 'void for absurdity,' the cases of *Adams* v. *Savage*, and *Rawley* v. *Holland*, may be in danger of that judgment.

HENRY W. CHALLIS.

[1] *Que le mort de John Russell sans heire male, ad issint determine le particular franktenement, sur que le rem as droit heirs estoit.* (Moor. 721.)

[2] 'For the feoffees in the mean time are persons able to hold the land, and are liable to every man's *præcipe*, and no mischief at all.' (Moor. 720.)

ROMAN LAW IN BRACTON [1].

BRACTON'S great work, 'De Legibus et Consuetudinibus Angliae,' has of late begun to attract more of the attention which so important a source of legal history deserves. It is indeed to be regretted that no satisfactory edition of one of the fathers of our law should yet have been published, as a critical examination of the text and MSS. could not fail to throw great light on the many and difficult questions which the study of the work suggests. Of these the extent to which Bracton has 'Romanized the law of England' is a problem of much interest and perplexity. The writer was evidently well acquainted with the laws of Rome, and in one way or another Roman learning has supplied no small part of his work, but the extent and nature of its influence is a matter of great controversy. While Mr. Reeve is of opinion that it is only used by Bracton as an illustration and ornament, not adduced as an authority, and doubts whether the Roman parts of his work if put together would fill three whole pages of his book [2]; M. Houard has been so struck with his Romanizing tendencies as to omit him entirely from his collection of Anglo-Norman legal sources, as a corrupter of the law of England [3]. Sir Henry Maine speaks of 'the plagiarisms of Bracton [4],' and considers it 'one of the most hopeless enigmas in the history of jurisprudence that an English writer of the time of Henry III should have been able to put off on his countrymen as a compendium of pure English Law, a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus Juris.' Biener holds that Bracton allows no legislative authority to the Roman Law [5]; Spence, that he reproduced Roman incorporations which were good and valid English law [6]; while Prof. Güterbock is of opinion that Bracton has in general reproduced only those Roman elements, which were actually received in England as valid law, though in some instances he has made additions to them [7]. Where authorities differ so widely, a decided answer seems hardly possible.

Any student of this question labours under at least two great difficulties. While it is of the first importance to ascertain what

[1] The substance of this article will appear in a work to be published by the Cambridge University Press in October, on the Influence of the Roman Law on the Law of England. To this work, which obtained the Yorke Prize of the University for the year 1884, I must refer for a fuller examination both of Bracton's treatise and of the more general questions suggested by such a subject.

[2] i. 529. [3] Traités sur les Coutumes Anglo-Normandes, Paris, 1776.

[4] Ancient Law, p. 82.

[5] Das Englische Geschwornengericht; cited by Güterbock, p. 56.

[6] Spence, i. 124. [7] p. 57.

Bracton actually wrote, there is yet no edition of his work which can be considered as even moderately reliable; and while it is impossible to form an opinion as to how far some undoubtedly Roman parts of Bracton really represent the Law of England, without a careful study of the early history of the law as recorded in the Year Books, such a study is one to tax to the utmost the patience and ingenuity of the student, who has to trace through those black letter jungles of wrong references and corrupt readings, the present editions of the Year Books, some thread of law of the slightest character. Is it too much to hope that some wealthy body may yet consider a National Edition of the Year Books by a competent scholar an appropriate investment of its funds, and that the present generation may reap the fruits of its liberality[1]?

Of the present 'standard edition' of Bracton, it is difficult for any one who has worked with it to speak with patience. It was undertaken as part of the Rolls Series, a national work; a presumably learned and certainly titled editor purported to have laboured at it; and the result is merely a reprint of Tottell's edition with nearly all the old corruptions, a few new misprints, and many new and ingenious mistranslations. Each volume of the Rolls Series has prefixed to it a short account of the principles by which the editors are to be guided, and their connexion with the edition of Bracton has at least the merit of irony; 'the most correct text should be formed from an accurate collation of the best MSS.' is the rule for the editor; this wonderful edition of Bracton is the result the editor produces.

It is true that Sir T. Twiss may fairly urge that his instructions did not allow him to give references to the parallel passages of the Institutes, the Digest, or the Summa Azonis; 'no other note or comment was to be allowed except what might be necessary to establish the correctness of the text.' But though this might justify him in omitting twenty-three references to Roman parallel passages in twelve pages of text even though some of the omissions were the most obvious parallelisms, it would hardly be an excuse for giving twenty wrong references in the same space[2]. To give all parallel passages would be best, to give none may be the result of strict obedience to rules, but only to give a few, and many of those incorrect, is a course whose only merit, and that a doubtful one, appears to be to increase the knowledge of the Roman sources possessed by the unfortunate student who has to verify and correct them. John Selden was surely prophetic when he wrote of

[1] [An opportune question. In fact such a scheme is now afoot, but the time is not yet ripe to say more of it in public.—Ed.]

[2] Bracton, Twiss ed., ii. pp. 108–130.

Thornton: 'He passes by almost all the quotations of the Places cited out of the books of the Imperial Law by Bracton, *which are basely handled by his Editors*[1].'

On one point certainly Sir T. Twiss has exceeded his instructions. His notes are sometimes useful in establishing not the 'correctness' but the incorrectness of his text. Thus Tottell's version, speaking of those who have secretly contracted an illegal marriage, says that they appear to act 'non ex parte sciente (!) vel saltem affectatores ignorantiae,' and Sir T. Twiss reprints Tottell, with a note that one MS. has *scientiae* for *sciente*[2]. But the passage is a quotation from the Canon Law[3], and the editor actually gives the reference, which shows the true reading to be *expertes scientiae*, as contrasted with *affectatores ignorantiae*. So that the notes the editor adds enable one by reference to correct the text at once, even if Prof. Güterbock had not corrected it some years before in his work on Bracton and the Roman Law[4]. And the new edition is full of such blunders.

For instance, it does not seem to need great critical skill to guess that a text which makes Bracton fix the age of majority of the heir of socage lands at twenty-five years, results from a transcriber's error of xxv for xv, and even the fact that Tottell's edition has the same mistake need not have prevented the editor from correcting the text to agree with Glanvil[5]. Again when Bracton is made to explain that dower must be granted 'ad ostium ecclesiae,' and not 'in lecto mortali, vel in camera, ubi clandestina fuerint conjugia,' it does not seem difficult to alter the odd phrase *lecto mortali* in one far more appropriate to *clandestina conjugia — lecto maritali*[6]. It surely might have struck the editor as curious that Bracton should speak of a messuage as surrounded 'fossato vel haya vel palatio,' translated 'by a palace' (!); and a little ingenuity would have conjectured that a paling, *palo*, or palisade, *pallacio* or *palicio* (cf. fol. 221 *b*), was a more appropriate environment than a palace[7]. So it seems unnecessary to write that slaves may be punished in a different way from freemen, *eisdem factionibus*, when the Digest (which the editor omits to mention that Bracton has here been following for some time) gives the obvious reading *facinoribus*[8]. One of the gems of the edition is a passage at fol. 168, where Bracton is giving a list of persons who are in possession, but do not possess; Tottell has here the ingeniously stupid reading 'usufructuarius, item usurarius,' and our editor, instead of correcting to the obvious *usuarius*, reprints Tottell, and confirms his blunder by translating, 'likewise an usurer.'

Sir T. Twiss has produced great confusions, usually with the help

[1] Selden *ad Fletam*, ii. 4. [2] Br. f. 63. [3] X. c. 3, 4, 3.
[4] Güt. p. 127. [5] Br. f. 86 b; Twiss, ii. 5; Gl. vii. 9. [6] Br. f. 92.
[7] Br. f. 97 b. [8] Br. f. 105; Dig. 48, 19. 16.

of Tottell, by the omission or insertion of the little word *non*; which might have been corrected, if not by the consideration that Bracton did not as a rule write absolute nonsense, at any rate by a reference to the parallel passages in Azo or the Digest. To take one instance only: Bracton is following Azo as to the sum which the plaintiff claims in an action, which, both say, is 'quod querens aestimaverit.' As a few lines lower the judge is allowed 'summam quam querens aestimavit moderare et minuere,' it surely might have occurred even to Sir T. Twiss that it was not likely that Bracton would have written between the two passages that the plaintiff *cannot* estimate the injury he has sustained, 'aestimare non poterit injuriam[1].' And this idea would have been strengthened when, on referring to Azo, whom the editor does not cite, the passage was found to run *aestimare poterit*. I have noted at least four examples of the same obvious mistake. Of course in all of them Tottell's edition had made the blunder before.

But in his translation of the text, Sir T. Twiss has the glory of being original. I say nothing about the numerous printer's errors, the text which defines *injuria*, as 'quod non jure sit,' (perhaps because *sit* and *fit* are very much alike in Tottell's type)[2], the systematic way in which *pactum* appears translated as 'fact[3],' or the wonderful language in which the translation is written, as where *non domino vero* appears as 'to the non-lord[4].' We must reserve our admiration for the classical learning that translates *parones* as 'seafowl[5],' *res incorporales* as 'immovables' (where the point of Bracton's text is a comparison of lands and servitudes[6]), 'actio negotiorum gestorum' by 'action on the case,' a phrase which did not come into existence till thirty years after Bracton wrote, and which translates the euphemism 'ultimum supplicium' with severe literalness, as 'the last punishment.' Of more complicated examples, I can only give a few, which are samples of many:

Bracton.	Twiss.
Liberorum autem ... quidam sunt naturales et legittimi, qui ex justis nuptiis et legittima uxore procreantur. (Br. f. 64.)	For of children some are natural and legitimate, some (!) are procreated of a legal marriage and a legitimate wife. (Twiss i. 507.)
Gifts between husband and wife should be void, et est causa, ne fiant propter eorum libidinem vel nimis eorum immoderatam egistatem. (Br. f. 29.)	And there is a reason why they should not be made, on account of their lust, or their immoderate want. (Twiss i. 228.)

[1] Br. f. 98 b; Azo, 1103.

[2] Br. f. 155.

[3] e.g. *C. de pactis*, 'the code concerning facts,' f. 16 b; *nudum pactum*, 'naked fact,' f. 99. [Let us be strictly just. This may be nothing worse than systematic failure to correct the very common printer's confusion of *f* and *p*, which in many handwritings are distinguishable only by the context.—Ed.]

[4] f. 165.

[5] f. 9.

[6] f. 164 b.

Bracton.	Twiss.
Item non tenetur aliquis haeres de facto, scilicet de disseysina antecessoris sui, quoad poenam disseysinae, licet teneatur ad restitutionem. (Br. f. 172.)	Likewise an heir *de facto* (!) is not liable, &c. (Twiss iii. 99.)
Si autem frater antenatus in vita patris communis obierit, relicto haerede de se, nepos vel neptis ex eo incipiet esse in potestate avi. (Br. f. 64 b.)	If the elder-born brother die in the lifetime of the common father, having left an heir of his body, the nephew or niece of his body (!) will begin to be in the power of the grandfather[1]. (Twiss i. 513.)

With these choice specimens we may perhaps take our leave of the Twiss Museum of curiosities of editing, in which subsequent inquirers may still find a rich harvest. But it is a matter of great regret that a work of importance should be edited in so slovenly and ignorant a manner[2].

Bracton's work can be divided into three parts:—

I. The part in which he has copied, with almost verbal accuracy, Azo, the Institutes, or the Digest. This consists of perhaps twenty-five folios out of the 450 or so of which his work is composed, to be found in Bk. I. (except cc. 8 and 10); Bk. II. cc. 1–4; Book III. ff. 98 b–104 b. The first Book on the Law of Persons is derived from Azo's summary of the first Book of the Institutes: the last chapter of the first book and the four chapters of Book II. from Azo's summary of the Institutes on the means of acquiring things *jure gentium:* the six folios in Book III. which deal with contracts, from the third Book of the Institutes and the Digest. The matter taken is in several places modified to represent the Law of England, and frequent omissions of unsuitable parts show an intelligent copying.

II. A part in which Roman principles appear to be the framework, though large masses of English matter are moulded on them. This consists of the rest of the second and the first treatise of the

[1] We must take it that Sir T. Twiss is himself the translator, as in correcting in one of his Prefaces (vi. 69) an obvious blunder, which concealed a misreading (which reference to Azo would have corrected), he says, 'the editor has by inadvertence mis-translated.' It is significant here that Sir T. Twiss refers for the text from which he prints, not to any MS., but to Tottell's edition.

[2] I may refer any one who may think this too strong to Prof. Vinogradoff's article on the 'Text of Bracton,' in the *Law Quarterly Review* for April, 1885, pp. 189–200, in which Sir T. Twiss' dealings with the MSS. are examined, and to Mr. Pollock's Preface to his work on Contracts, 3rd edit., pp. 7, 8. [The facts are eloquent enough without any testimony of mine. From my own partial collations of MSS. with the Record Office edition, I have every reason to believe that such examples might be largely multiplied. The most charitable supposition that could be made for the editor's scholarship would be that he caused the text to be translated by some semi-literate clerk, and did not himself even look through the translation. But one prefers not to express what, on that hypothesis, would be the inference as to his good faith.—Ed.]

third Book, and the treatise on the Assize of Novel Disseisin; it deals with donation, possession, inheritance, and the outline of the theory of actions and obligations, and perhaps comprises from a third to a quarter of the work. Embedded in the English matter are some unacknowledged citations from the Institutes, Digest and Azo; but they are not very frequent or of great importance. The influence of Roman principles is clearly seen here, especially in the treatment of possession, though sometimes their only effect is to give a form to English matter.

III. The remainder, and greater part, of the work shows, in my opinion, very slight, if any, traces of Roman influences. Roman terms are occasionally used, as was natural with a writer well acquainted with Roman law, and dealing with a system till then lacking in form and precision. The few citations from Roman sources have usually done duty already in other parts of his work, and make no important additions to the matter in hand. About two-thirds of the work is of this character, English in its matter with some slight traces of scholastic form.

Space will not allow me here to do more than point out under the first of these heads, how closely Bracton has copied his models, while I think that the omissions and variations he has made throw considerable light on his method of working, and the authority of the parts he has incorporated from the Roman Law.

Bracton's first Book is misnamed 'De Rerum Divisione.' This title only applies to its last chapter, which should in strictness form the first chapter of Book II. A general introduction (cc. 1–5), and chapters 'de personis et earum statu' (cc. 6–11), compose the rest of the book. I have carefully compared it with the corresponding portions of the Summa of Azo[1], and with the Justinianean sources, and I have no hesitation in saying that about two-thirds of it are taken all but *verbatim* from Azo. Where the Institutes are cited indirectly, which frequently happens, they are quoted in the form given to them by Azo. In only two places[2] does Bracton break away for more than three or four lines of his work from his model. On the other hand, while so much of Bracton is derived from Azo, large portions of Azo, such as the titles on *adoptio*, *capitis diminutio*, and several on *tutela* and *cura*, have been omitted as inapplicable to English Law.

A careful study of Bracton's variations from the *Summa* suggests his method of procedure. He had to reduce to form a chaotic mass

[1] 'Summa Azonis,' Venice, 1596; Bk. i. and ii. tit. 1, of Azo's version of the Institutes.
[2] c. 8, on feudal dignities; c. 10, on serfs and serfdom, in the middle of which the Roman mark of tame animals, having 'animum et consuetudinem revertendi,' is applied to slaves.

of English Law and custom, 'omne jus de quo tractare proposuimus . . . secundum leges et *consuetudines Anglicanas*[1].' His object was to reduce this confusion to such order that judgment by precedent or according to rule might be possible:—'a similibus procedere ad similia[2].' In the Roman Law he had ready to his hand an admirable form. He followed Azo closely, omitting such parts as were inconsistent with the existing English Law; varying those parts which might by modification be made consistent; and adding illustrations of his own from English sources, where the Roman ones did not strike him as apt. But where there was no English Law on the matter treated of he adopted Azo almost exactly, not from any desire to impose Roman Law on England, but because he thus gave completeness to his exposition, while, as the matter has never arisen in English Law, he perhaps did not consider it of great importance. We can thus explain the constant appearance in the extracts from Azo of Roman terms, having no English counterpart, which Bracton has not apparently thought it worth while to alter[3]. To read the two works side by side is the best proof of the correctness of this theory of his method, and it would be difficult, without great tediousness, to afford equally forcible evidence; but a few striking examples of each class of variation may be supplied.

I. *Cases where Bracton has omitted passages of Azo as inconsistent with English Law.* Azo defines the seashore as public up to the rise of the highest winter tide: Bracton, following him *verbatim* before and after this passage, omits it as conflicting with the claim of the Crown to the shore between high and low water mark[4]. Similarly, Bracton omits the rules as to the rights of the finder of a *thesaurus*, as conflicting with the Crown rights to Treasure Trove[5]. And these instances are the more striking because immediately before and after the omitted passages Bracton is following Azo very closely[6].

II. *Cases where Bracton has modified passages from Azo into consistence with English Law.* This is especially seen in the application of the maxim *Partus sequitur ventrem*[7]. This was only the English rule in cases of illegitimacy; as Bracton says, 'sequitur conditionem matris quasi vulgo conceptus.' If either of lawfully married parents was *constitutus in villenagio*, the child was a serf; but lawfully married parents, not in villeinage, made the child free, though the mother

[1] Bk. i. c. 6; f. 4 b. [2] f. 1 b.

[3] e.g. 'Praetor enim jus dicitur reddere (p. 104; Br. f. 3), usus, ususfructus, patria potestas, manumissio, adoptio,' the Roman names of servitudes, 'haereditas jacens, emancipatio, res sacrae, religiosae, sanctae, mobiles et immobiles.' But it is difficult to explain his adoption *verbatim* of Azo on the sacred nature of walls, and the capital offences committed by those who get over them. Br. f. 8; Azo, p. 1063.

[4] Br. f. 8; Azo, p. 1061. [5] Br. f. 8; Azo, p. 1063.

[6] See also Azo, p. 1055, 'In potestate aliena sunt servi, item filii.' Bracton (f. 9 b) omits 'item filii.' He also omits Azo's passage (p. 1063) as to the sacredness of 'legati.'

[7] Br. f. 5; Azo, p. 1052.

was born a serf[1]. Bracton can hardly fail to have been aware of this difference from the Roman Law, and Littleton, who followed him, certainly was as he writes, 'et c'est contrarie a la ley civille car la est dit, partus sequitur ventrem[2].' A similar change is seen in Bracton's use of the two terms, *statu liber* and *adscriptitius glebae*. The *statu liber* in Roman Law is a slave 'qui statutam et destinatam in tempus vel conditionem libertatem habet[3];' being conditionally freed by will. Bracton, citing the phrase from Azo, uses it of a slave who has deserted his master and whom his master does not claim within a year[4]. So the *adscriptitius glebae* in Roman Law was a *colonus* bound to the land, who passed with its sale, and had no rights of property against his master[5]. But Bracton uses the term of a freeman holding in villeinage who cannot be dispossessed of his land by his lord so long as he pays the customary dues. Again, Azo, speaking of the duration of *patria potestas*, says, 'Item morte civili dissolvatur, ut cum pater damnatur in metallum vel in opus metalli vel deportatur in insula,' which Bracton corrects into —'item morte civili ut si pater damnetur propter aliquam feloniam commissam[6].'

III. *Bracton illustrates his Roman principles by English examples. Jus possessionis*[7] is explained by a feud the subject of an *assize mort d'ancester*, and a freehold held for life. Azo's Roman illustrations of the maxim 'conditio feminarum est deterior in multis quam masculorum[8]' are omitted. His explanation of *emancipatio* is accompanied in Bracton by the remark 'secundum quod antiquitus fieri solet[9]:' and the passage on *tutela* is expanded by references to the wardship of feudal lords[10]. Cemeteries are introduced as an illustration of *res sacrae*, and the statement that they cease to be sacred if taken by the enemy is omitted[11]. And there is throughout the work a revision on minor points, which shows that Bracton has copied with intelligence. Thus he only reproduces three of Azo's six meanings of 'jus civile[12],' omitting refer-

[1] Güterbock's statement (p. 81), that in marriage the offspring followed the father, is shown to be too wide by Bracton's 'Item dicitur servus natione, de libero genitus, qui se copulavit villanae in villenagio constitutae sive copula maritalis intervenerit' (f. 5).

[2] Littleton, Tenures, § 187. As to the genuineness of this passage, see the note to this section in Tomlins' edition, London, 1841.

[3] Dig. 40, 7, 1.

[4] Br. ff. 4 b, 7, 197 b, 'Est enim statu liber qui personam habet standi in judicio quasi liber, licet non sit; cf. Azo, 1051, 1052. Bracton also introduces a new condition of *statu servi* analogous to 'liber homo bona fide serviens.'

[5] Cod. xi. 47; Br. f. 7, 'dicuntur glebae ascriptitii quia tali gaudent privilegio quod a gleba amoveri non poterunt, quam diu solvere possunt debitas pensiones;' cf. Azo, 1051.

[6] Azo, p. 1057; Br. f. 6 b; cf. also Azo, p. 1077 with Bracton, f. 6 a, on 'intolerabilis injuria,' and see Vinogradoff, *Law Quarterly Review*, p. 197.

[7] f. 3. But see on this passage Vinogradoff, p. 196; see also on 'ingenui,' f. 5.

[8] Azo, p. 1054; Br. f. 5. [9] Azo, p. 1057; Br. f. 6 b. [10] f. 6 b.

[11] f. 8; Azo, p. 1062. [12] f. 4; Azo, p. 1050.

ences to the Twelve Tables and the *Responsa Prudentum*, and the statement that 'jus civile' without other words refers to the Law of Rome.

To turn to positive results, Bracton[1] has taken the definitions of *justitia*, *jus*, *jurisprudentia*, *aequitas*, and the *tria praecepta juris*, from the Institutes as represented in Azo, together with his distinction between human and divine justice, and much connecting matter. In his fifth chapter[2] he has the definitions of *jus naturae*, *jus gentium*, *jus civile*, and the division into *jus privatum* and *jus publicum*, relating *ad statum reipublicae*[3], and dealing with the subject matter of *sacra*, *sacerdotes*, *magistratus*. The sixth chapter[4] contains the Institutional divisions into *jus ad personas*, *vel ad res*, *vel ad actiones pertinens*, and of *homines* into *liberi* and *servi*; Azo's difficulties as to *adscriptitii* and *statu liberi*; the definitions of liberty and slavery, taken through Azo, from the Institutes; the maxim *partus sequitur ventrem*; and parts of Azo on *ingenui*, especially a passage on the effect of servitude during pregnancy[5]. In his seventh chapter he follows Azo on *libertini* and on monsters[6], even in his quaint illustrations. The eighth chapter, on the ranks of persons, is of Bracton's own composition. The ninth contains the Institutional division[7], 'homines sui aut alieni juris,' with Azo's addition 'aut dubii.' Azo's account of *postliminium* is taken almost *verbatim*, with one curious exception. The maxims, 'quidquid per servum juste acquiritur, id domino acquiritur,' and 'pater est quem nuptiae demonstrant,' are both adopted. The tenth chapter expands Azo on guardianship with reference to feudal wardship; and the whole of this chapter, which deals with a subject on which English materials are at hand, shows more originality. The twelfth chapter, 'De Rerum Divisione' follows Azo[8] very closely: it adopts the Roman divisions of *Res; in patrimonio nostro vel extra; corporales vel incorporales: mobiles vel immobiles; communes, publicae, universitatis, nullius, singulorum;* and copies Azo's illustrations all but word for word.

In fact no mere recital of similar subjects will show the identity of order and language, which proves convincingly that, during the greater part of this first book, Bracton has simply copied the *Summa Azonis*. Whether in doing so he has suppressed any English Law at variance with his text, or has added any new law to that which he found existing, or again whether the matter thus incorporated has survived in English Law are questions we must reserve. And after the examples cited by Prof. Vinogradoff, we must wait

[1] Br. i. c. 4; Azo, p. 1047.
[2] Azo, p. 1048.
[3] Azo has 'ad statum rei Romanae.'
[4] Azo, p. 1051.
[5] Azo, 1052; Inst. i. 4, pr.
[6] Azo, pp. 1053. 4.
[7] Azo, p. 1055; Inst. i. 8.
[8] Azo, Book ii. on Institutes, title 1.

for a trustworthy examination of the MSS. before we can decide whether some of the modifications of Roman matter are not really glosses by English lawyers on Bracton's Roman text.

The first three chapters of Book II, 'De acquirendo rerum dominium' are taken almost literally from Azo[1]. They deal with methods of acquisition *jure gentium* on purely Roman lines; but Bracton's treatment shows that he is only applying Roman rules where there is no express English rule on the subject. In speaking of acquisition of wild animals by capture[2], he adds to the Roman rule 'nisi consuetudo vel privilegium se habeat in contrarium,' and again 'et haec vera sunt nisi aliquando de consuetudine in quibusdam partibus aliud fiat.' Again, as to 'insulae in mari natae[3],' Bracton adds 'nisi consuetudo se habeat in contrarium propter fisci privilegium': and with respect to islands in a public river, he adds to Azo's *conceditur occupanti*, his own English comment 'et per consequens regi propter suum privilegium[4].'

Occupatio, *Alluvio*, *Accessio*, *Specificatio* and *Confusio* are all treated almost in the words of Azo, though Bracton omits most of the Roman illustrations of his model[5], and adds English ones[6]. On minor points he corrects Azo; thus he omits the rules as to the acquisition of *thesaurus*, as inconsistent with English Law; he changes the *difficilis persecutio* of a hunted animal, which destroys property in the pursuer, to *impossibilis persecutio*[7]; he inserts the Roman provisions as to *agri limitati*[8], but omits the rule as to their capture by the enemy, as improbable in England. In several places he abridges his models; he gives the rule as to *accessio literarum*, and states frankly 'ut in Institutis plenius inveniri potest et in summa Azonis[9];' Azo, in fact, gives some fifty lines of illustration of the rule, which Bracton omits. In treating of accession of buildings he adopts the maxim 'omne quod inaedificatur solo cedit,' but abbreviates and anglicizes his model. Here his copying results in two curious slips[10]; he quotes Azo that *confusio* differs from *mixtio* in three respects, but he only gives two of them, and by the omission of a negative[11] in an attempt to combine two sentences in one, he entirely misrepresents Azo. His fourth

[1] Br. ff. 8 b–11; Azo, pp. 1063–1072.
[2] Br. ff. 8 b, 9; Azo, p. 1064.
[3] Br. f. 9; Azo, p. 1064.
[4] Br. f. 9 b; Azo, p. 1065. Compare also Azo, 1063; 'per occupationem eorum quae non sunt in bonis alicujus, ut sunt ferae bestiae' with Bracton's insertion after 'alicujus' of the clause 'et quae nunc sunt ipsius regis de jure civili, et non communia ut olim.' But several of these extracts look suspiciously like glosses which have wandered into the text.
[5] 'de glande legenda, tigno injuncto, actio de dolo, doli exceptionem;' Azo, p. 1064.
[6] Br. f. 8 b. He adds *cygni* to Azo's list of tamed wild animals.
[7] Azo, p. 1064; Inst. ii. 1, 12; Br. f. 8 b.
[8] Br. f. 9 b; Azo, p. 1065.
[9] Br. f. 10; Azo, p. 1067.
[10] Br. f. 10 b; Azo, p. 1069.
[11] Ibid., 'Si autem (non) separari.'

chapter[1], which treats donation as a means of acquisition *jure civili*, instead of *jure naturali*, as in Azo, copies almost word for word Azo's section on *res corporales seu incorporales*, and on servitudes. But with this chapter the continuous copying of Azo ceases: and up to this point we infer that, while Bracton has adopted Roman Law bodily, he has yet modified or omitted whatever portions are actually inconsistent with existing English Law.

Bracton's third Book is divided into two treatises, *De Actionibus*, and *De Corona*, which deals with Criminal Law. The treatise on Actions includes also Obligations, and completes Bracton's consideration of Contracts, which had begun with *Emptio-Venditio* and *Locatio-Conductio* in the second Book.

On Sale, Bracton deviates considerably from Roman law[2]. *Emptio-Venditio* in the Roman system was a consensual contract; but according to Bracton, unless at the time of the agreement an earnest (*arrha*) is given, or the whole or part of the price is paid, or until the contract is reduced to writing, either party can withdraw from the mere agreement[3]. Justinian called the *arrha*, *argumentum emptionis*, a proof, not a part of the contract; but Bracton quotes the same phrase as proving the *arrha* to be an essential element of a valid contract. Glanvil had doubted whether the vendor could retreat from the contract, without forfeiting the earnest; Bracton decides, in accordance with Justinian, that he forfeits *twice* the earnest[4]. Between the times of agreement for sale, and of delivery by the vendor, the Roman Law put the thing sold at the buyer's risk, so far as accident was concerned; Bracton, following Glanvil and the old law, puts it at the risk of the seller[5]. His reference to conditional sale is from the Institutes[6]. According to Bracton and Justinian the buyer of movables may rescind in case of undisclosed faults; but in the case of land, according to Bracton, the buyer must bring an action to enforce delivery of the land as contracted for. In modern times the development of commerce has led to the adoption of *Caveat Emptor* as the general rule, but subject to many exceptions[7].

[1] Br. f. 10 b; Azo, 1070-1072.

[2] Br. ii. c. 27; Güt. 144; Just. Inst. iii. 23, pr.

[3] Inst. iii. 23, pr.; Br. 61 b. But in c. 28, apparently following Justinian, Bracton speaks of sale as contracted 'postquam de precio convenerit.'

[4] Glan. x. 14; Br. f. 62. The 'Regiam Majestatem' also forfeits *twice* the earnest. See Moyle, Inst. i. 418 note.

The doctrine of forfeiture of earnest still survives; see *Home* v. *Smith*, L. R. 27 Ch. D. p. 102, where Fry, L. J., expressly refers it to Bracton and the Roman Law.

[5] He actually cites the Institutes, substituting *qui eam tenet* (i. e. *venditorem*) for *emptorem*. Br. f. 62; Just. Inst. iii. 23, 3.

[6] Ibid. iii. 23, 4.

[7] Benjamin On Sale, 3rd edit., pp. 606-633.

Bracton treats *Locatio-Conductio* very briefly[1]; the fixing of the price is its investitive fact. The hirer's liability 'qualem diligentissimus paterfamilias' is taken from the Institutes, and the liability of the hirer's goods in his hired house for rent is treated on Roman lines.

In the first half of the third Book the influence of the Roman Law is very marked: much of the text is taken word for word from the Institutes, and parts are derived from the Digest and from Azo. The scantiness of Bracton's exposition of the law of contracts is explained, on the one hand by the slight importance of personal property, on the other by the jurisdiction of the Ecclesiastical Courts over all promises not susceptible of proof by the strict rules of the Common Law, as *laesiones fidei*, breaches of faith[2].

The first four chapters are composed almost entirely of Roman material[3]. Indeed the form, which is Institutional and Academic, lends countenance to the supposition that Bracton lectured on the Civil Law at Oxford. '*Actio*' is defined, following the Institutes and Azo, as 'jus prosequendi in judicio quod sibi debetur[4],' and the subsequent explanations are taken from Azo. The *Actio*[5] is said to arise from preceding obligations as a daughter from a mother, the comparison being Azo's. The division of obligations, 'orientes ex contractu, vel quasi, sive ex maleficio vel quasi,' is taken from Justinian[6], and the subsequent doctrine of *vestimenta pacta* is also civilian.

Obligations[7] are defined in the words of Azo, following the Institutes, as 'juris vinculum, quo necessitate adstringimur ad aliquid dandum vel faciendum;' they are divided, *re*, *verbis*, *scripto*, *consensu*; and real obligations (*mutuum*, *commodatum*, *depositum*, and *pignus*) are dealt with in the words of Justinian[8], omitting the technical terms of the Roman *actiones*. This passage is not filtered through Azo, but taken direct from the Institutes, neither does Bracton appear to have followed Glanvil in this, the most Roman part of Glanvil's work. The passage as to liability for accidental loss is obscure[9], but the printed version appears to contradict Glanvil's statement of the English Law[10], which, following an older law, made the *commodatarius* liable for *casus*, while Bracton,

[1] Br. ff. 62, 62 b; Just. iii. 24, 5, et al.; Güt. pp. 146, 147.

[2] Glan. x. c. 8, 18; Bracton, f. 100 a—'de quibus omnibus conventionales stipulationes omnino curia regis se non intromittit nisi aliquando de gratia.' Pollock on Contracts, 139, 4th ed.; Güt. p. 139.

[3] ff. 98 b–104 b.

[4] *Pro*sequendi, printed by the 1569 edition and Twiss, is probably a printer's error. Azo and the Institutes have *per*sequendi. Azo, 1118; Inst. iv. 6, pr.

[5] Br. f. 99; Azo, 1103. [6] Just. Inst. iii. 13, 2; Güt. 140.

[7] Br. f. 99; Azo, 304; Inst. iii. 13, pr. [8] Inst. iii. 14.

[9] Owing to probable corruption of the text. Lord Holt quotes a different version.

[10] Gl. x. 13.

in accordance with the Institutes, relieves him, if he has acted as 'diligentissimus paterfamilias[1].'

While the general treatment of obligations *verbis, per stipulationem'* is Institutional[2], Bracton makes an important adaptation to English procedure. A simple stipulation, as we have seen, could not be sued on in the King's Courts, as being incapable of proof. After suggesting that a deaf man might make a stipulation by nods or writing, he adds[3] 'et quod per scripturam fieri possit, stipulatio et obligatio videtur, quia si scriptum fuerit in instrumento aliquem promisisse, perinde habetur ac si interrogatione praecedente responsum sit,' and though Bracton is silent, *Fleta* expressly says that a writing without seal will not suffice[4]. Again: 'Per scripturam vero obligatur quis, ut si quis scripserit alicui se debere, sive pecunia numerata sit, sive non, obligatur ex scriptura, nec habebit exceptionem pecuniae non numeratae contra scripturam, quia scripsit se debere.' This was contrary to Roman Law which allowed such an exception to be used within two years[5]. In this practical adaptation of the Roman Law, by merger of the obligations *verbis et litteris*, Bracton found a connecting link between his Roman principles and the English Law: with a similar object he omits the rule 'alteri stipulari nemo potest,' and makes such a stipulation possible even *sine poena*[6]. Apart from these differences the minor distinctions of the Roman Law are faithfully reproduced[7], even to the extent of speaking of a judicial stipulation as 'quod fit jussu praetoris.' But it may well be doubted whether these extracts have had any substantial influence upon English Law.

Bracton just touches on obligations *ex consensu*[8], but as he has already dealt with sale and hiring, and as purely consensual contracts could have no place in the King's Courts, he does no more than mention them. Similarly with obligations *quasi ex contractu* he merely mentions the heads contained in the Institutes, using the technical Roman terms, and says no more[9]. The persons through whom an obligation is acquired[10], the means by which an obligation is dissolved, and the general rule, 'obligatio dissolvitur eisdem

[1] Güt. 141 n.; Br. f. 99 b; Inst. iii. 14, 2; Fleta, ii. 56, § 5, follows Bracton.
[2] Br. ff. 99 b, 100; Inst. iii. 15 and 19.
[3] Br. f. 100, at the end of a passage taken from Dig. 44, 7, 1, 15.
[4] Pollock, 138; Br. f. 100 b; Holmes, 272; Fleta, ii. 60, 25; Güt. 144. Cf. Br. f. 101, 'obligatio tollitur, si dicatur . . . . et responditur, *vel scribatur*.'
[5] Inst. iii. 21, pr. (before Justinian, 5 years).
[6] Cf. Just. Inst. iii. 19; 19 and 21; Br. f. 100 b.
[7] e. g. 'Stipulationes pure vel modo, sub conditione; facta et loca in stipulationibus, judiciales et conventionales stipulationes; stipulatio praepostera.'
[8] f. 100 b.
[9] Cf. Br. f. 100 b, with Inst. iii. 27.
[10] Br. ff. 100 b, 101; Inst. iii. 28 and 29.

modis quibus contrahitur,' with several technical terms[1], are taken from the Institutes.

Delicts and quasi-delicts are also treated very shortly, the examples of a quasi-delict being the Institutional one of a judge knowingly giving a wrong judgment[2]. *Injuria* is defined, after Justinian, as *quod Jure non fit*, and the Roman rule of non-liability of heirs for their ancestor's delicts is followed[3].

Bracton identifies actions with *placita* or pleas[4]: he adopts both Glanvil's division of *civilia-criminalia*, and Azo's of *realia, personalia, mixta*, which seems a combination of the Institutional divisions *in rem, in personam;* and *rei* vel *poenae persequendae* vel *mixtae*[5]. The term *crimina capitalia* is from the Institutes[6], though the illustration is changed. Personal actions[7] are defined in the words of Azo[8], and Bracton adds that the heir is bound 'nisi fuit poenalis.' Personal actions *ex maleficio*[9] are again divided into 'quae persequuntur poenam, vel ipsam rem et poenam:' while actions *in rem* are divided, as in Glanvil, into *petitory, super proprietate rei*, and *possessory, super possessione*[10]. The *actio mixta* is defined in Azo's words 'tam in rem quam in personam, quia mixtae habent causam ad utrumque[11],' and a number of the following divisions are taken from the Roman Law[12].

The Institutional division of Interdicts; *causa recuperandae, adipiscendae, retinendae possessionis;* is applied by Bracton to actions, and identified with the leading Assizes[13]. Under *actiones recuperandae possessionis causa* he places the Assize of *Novel Disseisin*, and identifies it with the 'actio unde vi' (*sic*). *Actiones adipiscendae possessionis causa* include the Assize *Mort d'ancester*,

[1] 'Exceptionem doli; pactum de non petendo; exceptionem metus; exceptionem jurisjurandi; exceptionem rei judicatae; acceptilatio, novatio; quasi traditio;' and the subject-matter of the *stipulatio Aquiliana*, though the name is not used.

[2] Br. f. 101; Inst. iv. 5, pr. [3] Inst. iv. 4, pr.; cf. Br. f. 101 b.

[4] Gl. i. 1; Br. f. 101 b.

[5] Br. f. 101 b; Azo, f. 1119; Inst. iv.; 6; 1, 18–20; Coke, Inst. ii. 21, 285.

[6] Inst. iv. 18, 2. [7] Br. f. 102; Inst. iv. 6, 1; cf. Azo, f. 1119.

[8] Br. f. 102; Azo, 1119, 'quae competunt contra aliquem ex contractu, vel quasi, ex maleficio, vel quasi, cum quis teneatur ad aliquid dandum vel faciendum.' The phrase '*nativae*, ex contractibus,' as applied to them is Azo's, who contrasts it with '*dativae* ex legibus.' Azo, 1131.

[9] Cf. Inst. iv. 6, 18; Azo, p. 1126.

[10] Glan. i. 3; Azo, f. 1119; Inst. iv. 6, 1; Br. f. 103; Güt. 151.

[11] Azo, 1126; Br. f. 102 b.

[12] e. g. 'simplices, duplices; perpetuae, temporales,' Br. f. 102 b; Azo, 1129, 1130; Inst. iv. 12, pr. 'transitoriae;' Azo, 308; Br. f. 103; 'in simplum, duplum, triplum, quadruplum,' Azo, 1127; Br. f. 103; Inst. iv. 6, 21, 24; 'directa-contraria,' Br. f. 103, to which Bracton adds 'indirecta;' 'confessoria-negatoria,' Azo, 218; Dig. 8, 5, 2 pr. though Bracton makes 'actio confessoria, cum dicat quis aliquem rem corporalem suam,' instead of limiting it to the assertion of a servitude, as in the Roman Law. He also uses the term *praejudicialis* of an *actio* instead of a *formula*, Br. f. 103, and several terms not otherwise used in English Law, e. g. *Actio legis Aquiliae—vi bonorum raptorum.*

[13] Br. f. 103; Inst. iv. 15, 2.

identified with the 'actio quorum bonorum.' An instance of *actiones retinendae possessionis* is found in 'interdicta ne quis alteri vim fiat.'

In treating of 'quibus competant actiones,' Bracton appears to vary from Roman Law. The Roman *actio furti* was open to any one *cujus interest rem salvam fore*, but not to the owner, if he had an action against the person from whom the goods were stolen. Bracton allows the owner an *actio furti sive condictio*, against the thief or his successor. Now the bailee at English Law[1] had an action against the thief, and for that reason was liable over to the owner, who according to Roman Law would therefore have had no *actio furti*. Probably Bracton means by 'actio furti sive condictio' no more than *condictio*, in which case he accords with the Roman Law which gave the *dominus* a *vindicatio*, *actio ad exhibendum* or *condictio*, for the thing itself, though the *actio furti* was not open to him[2]. The *Actio legis Aquiliae*[3] is thus adapted to English Law, 'Actio legis Aquiliae de hominibus per feloniam occisis vel vulneratis dabitur propinquioribus parentibus, vel extraneis homagio vel servitio obligatis, ita quod eorum intersit agere,' which appears to refer to the *wergeld* while anticipating Lord Campbell's Act.

Other Roman actions, *actio injuriarum*[4], *quod metus causa*[5], *de dolo*, are briefly dealt with. The *Actio de vi* is described as *duplex*, 'scilicet rei restitutoria et poenalis,' whereas the Institutional[6] meaning of the term is 'quia par utriusque litigatoris in his condicio est nec quisquam praecipue reus vel actor intelligitur, sed unusquisque tam rei quam actoris partem sustinet.' In dealing with the 'Actio quod vi aut clam[7]' Bracton follows the Digest closely, except that so far as the Interdict is penal, or for compensation, it could not be brought against the heirs according to Bracton, whereas the Digest gave it to and against heirs 'in id quod ad eos pervenit[8].' The *Actio sive Interdictum de itinere actuque privato* is cited *verbatim* with the prefix, *Ait enim praetor.*

At this point, Bracton's close following of the Institutes ceases, though the influence of the Civil and Canon Laws is still noticeable[9]. Frequent Roman citations are found, especially towards the end of the treatise, on the question of the order in which actions

[1] Holmes, C. L. 175.
[2] Cf. Inst. iv. 1, 19.
[3] Br. f. 103 b, the rule as to *actio vi bonorum raptorum* is taken from Inst. iv. 2, 2.
[4] Br. f. 103 b; Inst. iv. 6.
[5] Ibid.; Inst. iv. 6, 27; Dig. 4, 2, 14, 3. [6] Inst. iv. 15, 7.
[7] Br. f 104; Dig. 43, 24, 15, 3. Bracton's clause 'sed datur in eo (*sic* Twiss), quae sunt restitutoria,' may be meant to cover this.
[8] Br. f. 104; Dig. 43, 19; 1 pr.
[9] Cf. 'actio praejudicialis,' f. 104, 'crimen falsi,' f. 104 b, the passage on *judicium*, f. 106, taken from Azo, p. 158, and on *munus*, f. 106 b, from the Canon Law and Code, which is expressly cited (Cod. 9, 27. 3); Güt. p. 154.

should be tried, where in two folios there are found eleven quotations from the Digest and Code, and one from the Canon Law[1]. Bracton cites the well-known Roman maxim, 'quod principi placuit legis habet vigorem,' with the addition of a quotation apparently from the *Lex Regia* which is expressly referred to: the distinction between ordinary and delegated judges is also derived from the Canon Law[2]. In short, the whole treatise shows considerable study of the Roman Law, and is largely made up of Roman material, though it may be doubted whether it practically affected the English courts in any marked degree.

I have now completed my examination of the first of the portions into which Bracton's work has been divided, but space fails me to deal here with the other two parts[3]. There remains, however, the important question whether, as regards this Roman Law which Bracton incorporated, he did, as Spence and Güterbock hold[4], only reproduce what was already held as valid law in England, being thus a trustworthy source of law, and not a plagiarist; or, as Sir Henry Maine suggests, did he actually introduce new Roman matter as English Law[5]? There seems to me to be very slight materials in existence for a positive answer to this question; but I myself should incline to agree with Sir H. Maine (though I think his estimate of Bracton's indebtedness is as excessive as that of Mr. Reeves is under the mark[6]), that, as regards the first part of Bracton's work, it was new matter to the English Law, directly copied from Roman sources, to fill up a framework of his first three books which he had adopted from the Institutes. As to the second part, I think that Bracton has both introduced new Roman matter, and reproduced English Law, derived from the Roman by the decisions of other clerical judges, and then recognized as the law of the land.

In considering Bracton's first Book, a conjecture was offered as to his method of writing[7], and we have found no reason to depart from the opinion there expressed. English Law was reduced to order on a Roman framework, furnished with many Roman terms, its gaps filled up with actual Roman matter so long as this was not inconsistent with English Law. At the same time Roman influences, acting on the judges, vary some existing English rules, such as those as to nuptial donations, curtesy, and forfeiture of earnest. But I know of no case where Bracton has cited Roman Law, the previous English rules being to a contrary effect, unless

[1] ff. 114, 114 b.
[2] Br. f. 107, 108; Güt. p. 155. [3] v. supra, pp. 429, 430. [4] Spence, i. 123, 124; Güt. 57.
[5] Maine, Ancient Law, p. 82.
[6] Maine, 'one third of matter, and whole of form:' Reeves, 'not three pages' (i. 529).
[7] v. supra, p. 431.

indeed some recent decisions give him warrant. On the contrary we have seen many examples of his 'intelligent copying,' and in the rest of his work, we may compare his adaptation of the definition of theft, the conception of *donatio*, and the account of treasure-trove. This intelligent copying contrasts strongly with the unintelligent plagiarism of his followers, which converted the 'actio familiae herciscundae' into 'accioun mixte que est appelé en la ley le Emperour, accioun de la mesnee dame de Herciscunde[1].' To him English Law is undoubtedly indebted for an extensive Roman terminology which survives to the present day; the Roman form of his first three Books has been less fortunate, though Blackstone's Commentaries show some traces of its influences. But I do not think that Bracton himself is responsible for many material alterations based on the Roman Law, though he records some important ones which have been made by his predecessors and contemporaries under civilian influences; and certainly M. Houard's charge against him of Romanizing the law of England cannot to any serious extent be justified.

T. E. Scrutton.

The following additional specimens of Sir Travers Twiss's dealing with Bracton have been communicated to the Editor by a friend:—

'Perhaps one who himself has had sad experience may be permitted to warn any of your readers who may be inclined to verify Bracton's citations against trusting to the English version for which Sir Travers Twiss is answerable. The task of finding cases in the rolls is always laborious, and is not lightened by such translations as the following:—

Bracton.	Twiss.
Vol. ii. p. 94. de hac materia inveniri poterit de termino Sanctae Trinitatis anno regni regis H. Septimo.	on this subject a case will be found in Holy Trinity Term in the sixth year of King Henry.
Vol. v. p. 470. ut de term̄ S. T. anno regis H. quarto.	as in Holy Trinity term in the fifth year of the king.
Vol. vi. p. 54. probatur de term̄ S. Michaelis anno regis H. xvi incipiente xvii in com̄. Midd.	is proved in St. Michael's term. [Year and county omitted.]
Vol. i. p. 504. in comitatu Sussex.	in the county of Suffolk.
Vol. iii. p. 300. in com̄ Sussex.	in the county of Essex.
Vol. v. p. 68. in com̄ Lync.	in the county of Leicester.

'These curiosities have simply fallen in my way. I have not sought for them. How many more of the same kind might be

[1] Britton. iii. 7. 1.

found I do not know, nor shall I inquire, for these few have wasted time enough. Doubtless they show nothing worse than carelessness about a matter which deserved the greatest care, the same sort of carelessness that (vol. v. p. 428) translates *petens* by *tenant* instead of *demandant*, and (vol. i. p. 106) *feoffato* by *feoffor* instead of *feoffee*; the same sort of carelessness that within the compass of two consecutive pages (vol. i. pp. xviii, xix) can call the king in whose reign the Statute of Westminster I. was passed thrice *Edward III.* and once *Edward I.* The translator of course knew that *calcaria deaurata* (vol. i. p. 278) does not mean *gilded sandals*, for elsewhere (vol. v. p. 82) he renders the same phrase by *gilt spurs*. One of the most interesting passages in the whole book (vol. iii. p. 300) is utterly perverted, because for the Latin *dictum fuit praedicto Martino* we get the English *it was said by the aforesaid Martin*. It must be a mere clerical slip which gives us *by* where we should expect *to*, though a slip which spoils the whole story. But then by way of compensation, and so that another story may be spoilt, we have (vol. i. p. 102) *donatio facta ab ea* represented by *the donation made to her*. It were difficult indeed to guess what was the clerical slip which turned (vol. i. p. 84) *Est autem donatio quaedam institutio* into *But donation is a kind of purpose*; nor is it easy to see how Bracton's very intelligible (vol. i. p. 304) *incorporalia non possunt possideri nec usucapi nec sine corpore tradi* became the merely nonsensical *incorporeal things cannot be possessed or be subjects of usucaption, nor can be delivered without a person*. Such slips we must regret; for they seriously impair the keen delight we must all have in a translation which converts (vol. i. p. 332) *actio negotiorum gestorum* into *an action on the case*.'

COMMON LAW AND CONSCIENCE IN THE ANCIENT COURT OF CHANCERY.

IT has commonly been supposed that the equitable jurisdiction of the Court of Chancery was altogether different in origin from its ordinary or common law jurisdiction. The opinion is, perhaps, not inconsistent with the evidence upon which it was formed, but seems to deserve reconsideration in connexion with three distinct but closely associated branches of enquiry. These are:—

(1) The functions of the Chancery as the *Officina Brevium* or fountain-head of justice sending forth its remedies for wrongs in the form of Original Writs returnable in other Courts.

(2) The judicial functions of the Chancery in proceedings commenced otherwise than by Bill.

(3) The judicial functions of the Chancery in proceedings commenced by Bill.

The first of these three subjects appears to have been commonly regarded as being less closely connected with the other two than it really was; and the last two appear to have been insufficiently illustrated by early cases.

There was a doctrine, so old that it is difficult to fix its age with precision, according to which there could not be any wrong which had not its appropriate legal remedy. The remedy existed in the form of the Original Writ which issued out of the Chancery upon a proper representation there of the facts to which it was to be adapted. It was, however, very soon found that this theory, though most satisfactory as a theory, was sometimes a little at variance with the exigencies of every-day practice and the circumstances of human life. The difficulty was recognised in the Statute of Westminster the Second, c. 24. By that Act an attempt was made to provide for cases to which the writs in the Chancery Register were not strictly applicable. The conclusion is of great importance in relation to the subject now under consideration:— 'And whensoever it shall happen from henceforth in the Chancery that in one case a writ is found, and that in like case falling under the same law and needing like remedy a writ is not found, let the Clerks of the Chancery agree in making a writ, or

adjourn the complainants to the next Parliament. And let the cases in which they cannot agree be set forth in writing, and let the Clerks refer the cases to the next Parliament. And let a writ be made by agreement among men learned in the law, so that it happen not from henceforth that the Court of the Lord the King do fail complainants when seeking justice[1].'

The Chancery is here recognised as the place in which new remedies are to be devised when necessary, but subject, in cases of extraordinary difficulty, to a reference to Parliament and the assistance of those who were learned in the law. The reference to Parliament and the agreement of men learned in the law appear at first sight to be somewhat abruptly brought into juxtaposition. But the Judges were members of the Council; petitions were commonly presented to the King 'in his Council in his Parliament' in relation to suits actually pending in various Courts; and, as will presently appear, decisions were given on judicial proceedings in the Chancery 'de avisamento peritorum de Concilio.' The Council, in fact, or the Council in Parliament, exercised a general supervision over all legal matters, though for certain purposes the Chancery was regarded as an office of Parliament.

If, now, we consider for a moment the judicial proceedings on what is usually called the Common Law side of the Court, under what is usually called its ordinary jurisdiction, we shall find much to remind us of the Act which provided for writs *in consimili casu*. In cases of *Scire facias* to repeal Letters Patent or upon Recognisances in the Chancery, and in Traverses of Office, the nature of the jurisdiction exercised may be best understood by the aid of the form in which the judgment was given. Without always preserving exact verbal identity it preserved a general uniformity in its outline or framework. Judgments of this kind have been preserved in considerable numbers *in filaciis Cancellariae* among a class of documents usually assigned to the common law side of the Court and now known as 'County *Placita*.' The following instances may sufficiently illustrate the subject:—'Habita plena deliberatione cum toto Concilio domini Regis, videtur Curiae,' &c.; 'De avisamento Justiciariorum et Servientium ipsius domini Regis ad Legem, ac aliorum peritorum de Concilio ejusdem domini Regis in eadem Cancellaria ad tunc existentium, consideratum fuit quod literae praedictae revocentur et adnullentur;' 'De avisamento domini Cancellarii Angliae, Justiciariorum, Servientium ad Legem, et Attornati ipsius domini Regis consideratum est,' &c.

[1] This is an independent translation, differing slightly both from that given in the 'Statutes of the Realm' and from that given in the 'Statutes at Large,' but will, it is believed, be found to agree with the original Latin as printed in 2 Inst., 405.

From these examples, ranging in date from the reign of Edward III. to that of Henry VI., it will be seen that judicial functions in the Chancery, even on the so-called Common Law side, were not always, if ever, exercised by the Chancellor alone. The authority of the Council or of constituent members of the Council was commonly asserted, or at any rate their advice was considered necessary. The proceedings are thus wholly distinct from those in the Courts of King's Bench and Common Pleas, where (though points of law might be referred to the Council during the progress of an action) judgment was given on the authority of the Justices of those courts respectively.

These facts should be borne in mind in considering the case of *Hals and others* v. *Hyncley*[1], to call attention to which is one of the principal objects of this article. It is probably the earliest (being of the reign of Henry V.) in which proceedings by Bill addressed to the Chancellor can be traced from the Bill itself to the decision. It was clearly not at common law, because the want of a common law remedy was the ground of the Bill, and yet it bears in many respects the strongest resemblance to proceedings which have in later times been thought to belong to the Common Law side of the Chancery.

The general heading or description of the proceedings is in the same form as the headings or descriptions of proceedings upon *Scire facias*. It is, perhaps, worth quoting in its entirety:—

'Placita coram Domino Rege in Cancellaria sua apud Westmonasterium in Octabis Sancti Michaelis anno regni Regis Henrici quinti post Conquestum septimo.'

Then follows a statement commencing, 'Be it remembered' ('Memorandum' in the original Latin) to the effect that John Hals, William Clopton, esquire, Robert Chichele, Thomas Knolles, William Cavendish, citizens of London, Robert Cavendish, John Tendryng the younger, William Bartilmewe, chaplain, James Hog, and Philip Morcell had exhibited 'venerabili in Christo patri Thomae Episcopo Dunolmensi, Cancellario Angliae, quandam Billam, quae sequitur in haec verba.'

The Bill (which, it will be seen, itself suggests the idea of a *Scire facias* towards the end) is in French, and may be thus translated:—

John Hals [and the other plaintiffs, as above] very humbly pray

[1] This case exists among the class of documents known in the Public Record Office as 'County *Placita*,' and generally supposed to belong to the Common Law side of the Court of Chancery (County *Placita*, Essex, No. 75). It was found by chance, during a search made with the object of illustrating, by the corresponding record, a report in the Year Books of a *Scire facias* in the Chancery. It is, however, but one of innumerable instances in which the legal historian might find altogether new material among the Public Records, and in which the value of the Public Records might be brought into greater prominence by careful study from a legal point of view.

[*supplient*] that (whereas one John Hyncley, of Thurlow in the County of Suffolk, esquire, has wrongfully disseised the said orators [*suppliauntz*], since the last passage of our Sovereign Lord the King to the parts of Normandy, of the manor of Pentlow and the advowson of the church of the vill of Pentlow with their appurtenances in the vill and lordship of Pentlow, whereof they were in peaceable possession at the time of the same passage, and it was so ordained by our same Sovereign Lord the King, upon his said passage, that no assise of Novel Disseisin should be prosecuted against any person whatsoever until our said Lord the King should return into England, wherefore they cannot have remedy by assise of Novel Disseisin to recover the said manor with the advowson and appurtenances aforesaid, to the great damage and annihilation of the poor estate of the said orators if they be not aided by your very gracious Lordship in this behalf) it may please your very gracious Lordship to consider this matter, and thereupon to command the said defendant to answer to the said orators in respect of the disseisin aforesaid, and whether he hath or knoweth anything to say for himself[1] wherefore the said orators should not be restored to their former possession of the manor with the advowson of the church and appurtenances aforesaid together with the issues and profits thereof in the meantime taken, for the sake of God and as a work of charity ('pur Dieu et en eovere de charite').

The *subpoena*, to compel Hyncley's appearance, then appears at length. Both the writ and all the subsequent proceedings are in Latin.

Hyncley appeared, prayed and had oyer of the Bill, and then answered or pleaded[2] to the following effect:—

One John de Cavendish, being seised of the manor and advowson, enfeoffed thereof one Andrew Cavendish and Rose his wife to hold to them and the heirs of the body of Andrew. Andrew and Rose were seised, and had issue William, who is still living and with the King in Normandy. Andrew died seised, and Rose, who survived him, leased the manor and appurtenances to one Thomas Clerk for a term of years still unexpired and, during that term, executed a charter of feoffment of the manor and advowson to John Hals and other feoffees (being the plaintiffs named in the Bill), and a letter of attorney directing certain persons to give livery of seisin to the feoffees. The feoffees and the persons named in the letter of attorney went to the manor with the intention respectively of receiving and

[1] It will be perceived that the form of a writ of *Scire facias* has served as a precedent for this part of the Bill.

[2] The distinction between a Plea and an Answer in Chancery was not recognised until a much later period.

giving livery of seisin, but the tenant for years did not and would not attorn to the feoffees. Rose thereafter took the profits of the manor to her own use, and so died seised thereof in her demesne as of free-hold. After her death John Hyncley, the defendant, as father of Katharine the wife of Andrew's son William and his next friend, at the time at which the disseisin is supposed to have been made, while William was abroad with the King, entered upon the manor and took and is at present taking the profits thereof to the use of William and with his consent. And Hals and the other feoffees, by colour of the charter and letter of attorney, would have entered upon the manor upon the possession of William and expelled him therefrom, and this John Hyncley, the defendant, would not permit them to do. 'Quæ omnia et singula idem Johannes paratus est verificare, pro-ut Curia, &c. Unde non intendit quod prædictus Johannes Hals et alii feoffati prædicti restitutionem manerii prædicti cum pertinentiis habere debeant, &c.'

The plaintiffs (saying by way of protestation that they did not admit the allegations of the defendant) replied to the effect that Rose was seised in her demesne as of fee of the manor and advowson, and enfeoffed thereof John Hals and the other feoffees, long before the King's last passage into Normandy, and while William was in England, and that Thomas Clerk, the tenant for years, attorned to them so that they were seised of the manor and advowson in their demesne as of fee long before the last passage of the King into Normandy. And afterwards Rose by a deed (produced in Court) released to the feoffees then in possession of the manor and advowson all her right and estate therein, and bound herself and her heirs to warranty. And now her heir is William. And Rose had nothing in the manor and advowson, nor did she take any profits thereof, after the feoffment, except at the will of the feoffees; and they were seised until driven out by the defendant after the last passage of the King into Normandy 'in forma qua ipsi per Billam suam prædictam supponunt. Et hoc parati sunt verificare, &c. Unde, ex quo prædictus Johannes Hyncley expresse cognovit expulsionem prædictam, petunt quod ipsi ad possessionem manerii prædicti una cum exitibus et proficuis inde a tempore expulsionis prædictæ in forma prædicta factæ restituantur, &c.'

The defendant (saying by way of protestation that he did not admit that Rose had ever been seised in her demesne as of fee, or had released to the feoffees, as they alleged), rejoined that Rose died seised of the manor and advowson as he had previously alleged, *absque hoc* that the tenant for years attorned to the feoffees, and *absque hoc* that the feoffees had any thing in the manor and advowson at the time at which the release was supposed to have been made.

'Et hoc paratus est verificare pro-ut Curia, &c. Unde petit judicium, et quod prædictus Johannes Hals et alii feoffati prædicti de restitutione sua manerii prædicti in hac parte præcludantur, &c.'

The plaintiffs sur-rejoined that Rose was seised and enfeoffed them, that the tenant for years attorned, and that Rose released to them while they were in full possession of the manor, as they had previously alleged, *absque hoc* that Rose died seised of the manor and advowson, or took any profits thereof after the feoffment, except at the will of the feoffees. 'Et hæc omnia petunt quod inquirantur per patriam.'

The defendant joined issue—'et prædictus Johannes Hyncley similiter'—just as in any other Court.

The issue was tried in a manner which is very remarkable. It was not sent into any other Court, but was treated as the subject of an Inquisition to be returned into the Chancery in the same manner as an Inquisition *post mortem* or other Inquest of Office. The special commission to take inquisition or verdict appears among the proceedings:—

'Henry, by the grace of God, King of England and France, and Lord of Ireland, to his beloved and faithful William Hankeford, Richard Norton, and William Cheyne, greeting. Know that we have assigned you jointly and severally to enquire by the oath of good and lawful men of the county of Essex by whom the truth of the matter may best be known whether' &c. [Here follow at length the allegations made on both sides, which it is unnecessary to repeat.] And if the jurors found in accordance with the allegations of the plaintiffs they were further to enquire on what day the expulsion from the manor and advowson took place, and the value of the manor *per annum*, 'and the truth respecting all other points and circumstances in any way concerning the premises. And therefore we command you that at certain days and places which ye shall have appointed for this purpose, ye make diligent Inquisitions on the premises and send them clearly and openly made without delay, to us in our Chancery, under your seals or the seal of one of you, and under the seals of those by whom they shall have been made.'

Hankeford alone took the Inquisition and returned it into the Chancery. The jurors found in accordance with the allegations of the plaintiffs, stating also the day of the expulsion and the value of the manor *per annum*. 'In cujus rei testimonium juratores prædicti huic Inquisitioni sigilla sua apposuerunt.'

Thereupon the plaintiffs 'venerunt coram ipso domino Rege in Cancellaria sua prædicta,' and prayed that they might be restored to their possession of the manor and advowson, together with the mesne profits, according to the form and effect of their Bill.

Then follows the judgment in these words:—'Super quo, habita super præmissis matura et diligenti deliberatione cum Justiciariis, et Servientibus dicti domini Regis ad Legem, ac aliis peritis de Concilio suo in Cancellaria prædicta existentibus, de eorum avisamento consideratum est quod prædicti Johannes Hals, Willelmus Clopton, Robertus, Thomas Knolles, Willelmus Cavendisshe, Robertus, Johannes Tendryng, Willelmus Bartilmewe, Jacobus, et Philippus ad possessionem suam manerii et advocationis prædictorum cum pertinentiis, una cum exitibus de eodem manerio a prædicto die Mercurii perceptis, restituantur.'

With the exception that they were commenced by Bill, and that appearance was compelled by *subpœna*, the whole of the proceedings resembled those on the so-called Common Law side of the Court. The pleadings between the Bill and the joinder of issue were, except in the conclusions praying for restitution or refusal of restitution, just such as might have been used in the Court of Common Pleas; and the final conclusion to the country with the *similiter* was in the ordinary common law form. The mode of arriving at the truth concerning the facts upon which issue was joined was simply that with which the Chancery had long been familiar in the ordinary Inquests of Office.

A word or two, however, may be necessary in relation to the persons who were appointed Commissioners for the purpose of taking the Inquest, Inquisition, or verdict. It will be observed that they are not described as Justices, or as holding any office, but simply as 'dilecti et fideles.' But as they were named William Hankeford, Richard Norton, and William Cheyne, and as the Chief Justice of the King's Bench was named William Hankeford, the Chief Justice of the Common Pleas Richard Norton, and a puisne Judge of the King's Bench William Cheyne, the triple coincidence leaves hardly any room for doubt that the Commissioners may thus be identified. They were no doubt included among those Justices and members of the Council upon deliberation with whom the judgment was ultimately given.

The Court, therefore, which heard the cause, and which, whatever may be its proper designation, gave judgment as prayed in the Bill addressed to the Chancellor, practically never lost sight of the matter even when the parties concluded to the country. The Letters Patent nominating the Commissioners passed under the Great Seal. The warrant—whether 'by the King himself'—'by writ of Privy Seal'—or otherwise—does not appear. But the whole transaction was very different from that of sending an issue to be tried in another Court, and comes very near if it does not actually amount to the calling of a jury by the authority of the Chancery itself for

the purpose of trying an issue joined in the Chancery. This, it has generally been said, the Chancery had not the power to do. It is however clear that a power existed, and was actually exercised, to obtain the verdict of a jury in proceedings by Bill addressed to the Chancellor without the aid of the Courts of King's Bench or Common Pleas. The power did not, perhaps, exist in the Court of Chancery, but may have been derived from a higher source. The Petition or Bill to the Chancellor was only a substitute for a Petition to the King, or King in Council, or King in Council in Parliament, the proceedings were before the King in his Chancery, and judgment was not given without the advice of the Council. The Chancery, in fact, appears to have been regarded as an office connected with the Council and Parliament, and, being the office for the issue of original Writs, was the most natural place for the discussion of the proper remedy when, for any reason, an Original Writ was inapplicable. A Commission to enquire concerning certain matters as well as for other purposes could, of course, issue under the Great Seal by authority of the King in Council. If, then, the whole proceedings are regarded as being under the King and Council, through some general delegation of power to the Chancellor to receive and examine Petitions or Bills, there is a complete unity of jurisdiction throughout.

It will be observed that the decision is in the form of a Judgment ('consideratum est'), and not of a Decree ('ordinatum et decretum est'), and that judgment ('judicium') was prayed in the course of the pleadings. It is commonly stated that there was a decree in Chancery as early as the reign of Richard II.; and could such a decree be produced it would be of great value for comparison with the proceedings in *Hals and others* v. *Hyncley*. That decrees were made by the King with the advice of his Council in the reign of Richard II. is a fact which admits of no dispute, but that they were made in Chancery, or in consequence of a Bill presented to the Chancellor, has yet to be shown. The proceedings in *Hals and others* v. *Hyncley* render it far more probable that the first decisions upon a Bill in Chancery took the form of judgments, and that the adoption of the form of a decree resembling that in which the King and Council administered extraordinary remedies, was of later date.

Sir Edward Coke, whose authority was once regarded as almost infallible, is responsible for a statement often copied and commonly accepted that the first known Chancery Decree was in the seventeenth year of the reign of Richard II. It is strange that so painstaking an author as Spence should have accepted Coke's assertion on this point without referring to the authority which Coke gave. Had he taken this simple precaution he would never have written

the following sentence and note: 'References to the Council were still made in extraordinary cases of a nature purely civil, but it seems to have been considered there that the Chancery was the proper Court for making decrees in such matters. See the case Rot. Parl. 17 R. II. 2 Inst. 553, 4 Inst. 83[1].' Even in the cited passages in the Institutes there is little to warrant Spence's general proposition, for Coke merely says that the Chancellor '*confirmed* by his decree the King's award made by the advice of his Council.' Had the Chancellor really done this it would have been a very memorable proceeding, but, as a matter of fact, he did nothing of the kind.

Coke's account of the case is erroneous in many particulars. He has not even correctly stated the names of the parties. What appears upon the Roll of Parliament[2] is briefly this. There is a Petition of John de Wyndesore to the King and to the 'tres sages Seignours de Parlement.' It contains a very long recital to the effect that the Petitioner and 'Monsire Robert de Lisle' had put themselves upon the order, award, and judgment of the King in respect of all disputes relating to certain manors; that the King had charged and commanded his Council to hear and examine the matters in dispute; that it appeared to the Council that Wyndesore had been ousted by De Lisle from the manors; that the King by advice of his Council ordered and decreed ('ordeigna et decrea') that Wyndesore should be restored to his previous estate in the manors; and that while Wyndesore was suing the necessary writs to be restored in accordance with the decree, Richard le Scrope purchased the manors of De Lisle by champerty, so that no execution could be had. Wyndesore therefore prayed restitution in accordance with the Decree made, not by the Chancellor but by the King with the advice of his Council.

His petition was read in Parliament, and various documents relating to the matter were there exhibited, including some produced by the Keeper of the Privy Seal and the Keeper (*custos*) of the Rolls. Among these was the King's writ of Privy Seal, reciting the decree of the King and Council, and directing the Chancellor 'to cause to be made out writs under our Great Seal, in due form, to the said Robert that he make restitution to the same John of the manors,' &c., 'and also to our Sheriff of the said county of Cambridge, that he be intendent' in carrying out the restitution. The writs drawn pursuant to these instructions and enrolled were also read. In them the King's Decree is recited (*ordinavimus et decrevimus*, &c.). The operative part of the writ, or, as Coke calls it, 'Injunction,'

[1] 1 Spence, 345.
[2] Rot. Parl. 17 Ric. II. No. 10 (printed, vol. iii. pp. 310-313).

addressed to De Lisle, is 'ideo vobis mandamus quod restitui faciatis,' and equivalent words are used in the writ addressed to the Sheriff. The Decree is throughout described as the Decree of the King, made by the advice of his Council; and the authority given to the Chancellor under the Privy Seal, is expressly limited to that of preparing and issuing writs, '*de executione Decreti facienda.*'

Upon a subsequent petition from De Lisle, the King sent another writ of Privy Seal, directing the Chancellor to prepare Letters Patent to the effect that Wyndesore was to be left to his remedy at common law, 'aliqua ordinatione seu decreto *per nos* in contrarium factis non obstantibus.' Thus, even after the supposed 'confirmation' in Chancery, the decree is described in the same words as before. From first to last there is no decree in Chancery mentioned, for the simple reason that no decree in Chancery was made.

Spence has cited another alleged decree in Chancery of the reign of Richard II. upon the authority of Sir Francis Moore's Reports[1]. In the place to which he refers there certainly do occur the words 'Decree en Chancery per ladvice des Judges' as applied to something which happened in the reign of Richard II.; but they occur in such a manner as at once to suggest a doubt and to render verification impossible. The report or note consists of a few lines only; there is nothing to show at what time it was made by Moore (who was King's Serjeant in the 12th year of James I.), and it is referred to the forty-first year of the reign of Elizabeth. In Easter Term in that year it is stated that Egerton, then Keeper of the Great Seal, said he had seen a precedent ('president') of the time of Richard II., to which he applied the above words 'decree,' &c. But neither the year of the reign nor the names of the parties are given, and any attempt to identify the case in any contemporary documents would therefore necessarily be vain. The actual words in the report can be accepted only as subject to all the following possible causes of error:—that Egerton did not care to distinguish carefully between a decree made by the King with the advice of his Council, and a decree made by the Chancellor; that Moore did not quote the precise words of Egerton in his manuscript notes; that the notes may have been inaccurately transcribed before they were sent to the printers; and that the printers did not reproduce the transcript with exact fidelity. Any one who has compared printed reports in French with the MSS. will know how frequently mistakes creep in. If the case cited by Coke, when examined and tested by the enrolment to which he refers, is found to give no sort of warrant for the assertion that it is an example of a decree in Chancery, it would hardly be prudent to accept as an example the

[1] 1 Spence, 345; Moore, Rep. 554.

case cited by Moore, which comes to us at third hand, and does not afford the means of further investigation.

The case *Hals and others* v. *Hyncley* may, therefore, perhaps fairly be regarded as the first in which we have the complete proceedings on a Bill addressed to the Chancellor; and it is remarkable that the decision did not technically take the form of a Decree, but followed the lines of a Judgment given upon *Scire facias*, and other proceedings on the so-called Common Law side of the Court. Even the Bill was made to savour of the latter jurisdiction by the introduction of a clause borrowed from the writ of *Scire facias*. There appears to be here a real instance of a connecting link in a process of development. It is to be remembered that a writ of assise of Novel Disseisin would in this case have issued out of the Chancery but for the fact of the King's general ordinance to the contrary. It was in the Chancery that another remedy was sought and was applied. But the methods used were for the most part those already familiar to the Chancery not as a Court of Equity according to later notions, but as a Court which, according to those later notions, is clearly distinguished from a Court of Equity. On the other hand, these familiar Chancery methods were not in early times regarded as being at common law. It was a subject of complaint in a petition in Parliament that the Justices of the King's Bench and Common Pleas were withdrawn from their own Courts to hear proceedings on *Scire facias* and Traverses of Office in Chancery; and the mischief which was alleged in consequence of this practice was the delay which it caused in the administration of the common laws of the realm [1].

On the whole, it seems clear that, as late as the reign of Henry V. there was no broadly marked distinction, as defined at a later period, between the two classes of judicial functions exercised in the Chancery. There was naturally a distinction (though apparently not any difference of origin) between the more or less extraordinary judicial functions exercised in it and the ordinary functions exercised in it as the office for the issue of Original Writs which were returnable and triable in other Courts. But, in the regular course of human affairs, that which is at one time extraordinary comes at length, from long familiarity, to be regarded as ordinary. If, too, in earlier times the extraordinary remedies took the form of Judgments, and some of them in later times the form of Injunctions or Decrees, a new element of difference was at length introduced. The proceedings which followed the old methods were classed as ordinary, those which followed the new as extraordinary.

[1] 'A grant arerisment de lesploit de voz communes leys de vostre roialme.' Original Parliament Roll, 2 Hen. IV., No. 95. The passage is not quite correctly printed in 3 Rot. Parl. 474 b.

The division between the two kinds of judicial functions was, however, wanting in clearness even as late as the end of the sixteenth century. Staunford, whose 'Exposition of the King's Prerogative' was published in 1590, was evidently in some uncertainty about the matter. In one passage[1] he says, in relation to a Traverse of Office in the Chancery, 'Note, that if the party take a Traverse which is judged insufficient in the law, this is peremptory unto him, and he shall not be received after to take a new, as appeareth in 40 Assise, 24. Howbeit T. 14 E. 4[2] the contrary opinion is holden, and that it is not peremptory, because it proceedeth in the Chancery which is the Court of Conscience. But, as to that, a man may answer and say that a Chancellor hath two powers, the one absolute, the other ordinary, and this Traverse is before him by an ordinary power, in which case all things touching the same must proceed as it should before any other ordinary Judge of the common law, and therefore it should appear ..... that if the party be nonsuit in his Traverse it is peremptory unto him, for so might he delay the King infinitely. *Tamen quære.*' Staunford probably leaned to the opinion that Traverses of Office belonged to a jurisdiction different from that of the Court of Conscience; but the words '*Tamen quære*' show that he did not consider the point to be settled. In another passage[3] he allows the contrary opinion to pass unchallenged:—'In 14 E. 4, fo. 7[4] it appeareth that one had traversed an Office which was sent into the King's Bench to try, and had forgotten to sue his *Scire facias*, and yet he was suffered to go again into the Chancery to pray a *Scire facias* upon the first Traverse, for it was said that the Chancery is a Court of Conscience, and for that cause the thing that was there amiss may be reformed at all times.'

In the end, of course, the difference between the two branches of the judicial functions of the Chancery became very distinctly marked, and was recognised by Statute. The case of *Hals and others* v. *Hyncley*, however, seems to be a curious monument of a time when the Chancery was not very clearly distinguished from the Council, and when lawyers had not arrived at any satisfactory distinction between a Court of Conscience and a Court of Common Law in Chancery.

L. Owen Pike.

[1] Fol. 65 b.
[2] The Year Book, Trinity, 14 Edward IV, No. 8.
[3] Fol. 77.
[4] Again the Year Book, Trinity, 14 Edward IV, No. 8.

THE ADMINISTRATION OF EQUITY THROUGH COMMON LAW FORMS.

EQUITY and its administration have been favourite topics with law reformers. Whether the distinction between equity and law is a sound and essential one, whether equity can be administered by the same court that administers law, and whether equity can be absorbed into the common law and be administered by common law forms have been the great questions. In the solution of the last question the American State of Pennsylvania has had a long practical experience. Her system, which is correctly described as the administration of equity through common law forms, has now been in existence for more than one hundred and fifty years. No other commonwealth in the world has tried the experiment in so thorough a manner or on such an extensive scale. It is therefore fair to say, that the exact value of the system, what it can and what it cannot do for the conduct of litigation, ought to be found in the experience of Pennsylvania.

The subject naturally divides itself into three parts. *First*, the various unsuccessful attempts, from the founding of the Colony in 1681 until the year 1836, to obtain courts with the usual Chancery powers. *Second*, as a consequence of these failures, the growth during the same period, of the administration of equity through common law forms. *Third*, the period from 1836 to the present time, during which the Courts have gradually obtained from the legislature nearly all the ordinary powers of Chancery.

William Penn obtained his charter for Pennsylvania in 1681, and by its terms could have at once erected a Court of Equity[1]. He did not do so. Apparently he was not an admirer of such courts; for he describes the Indians as not 'perplexed by Chancery suits,' and in accordance with his Quaker belief he made arrangements for having appointed by every County Court 'three peacemakers,' who acted as arbitrators to prevent law-suits[2].

But the General Assembly, which was created by Penn as the legislative body of the Colony, was of a different mind. In 1684 it made two provisions for introducing equity. The first made the County Courts courts of equity as well as of law. The second created a Provincial Court, which was to be a court for appeals from

[1] 1 Proud's Hist. Pa. 175.

[2] Ibid. 255, 262.

the County Courts, and was also to try all cases, both in law and in equity, not triable in the County Courts[1]. Both of these provisions were repealed by the English Government in 1793. The first was re-enacted by the General Assembly the same year that it was repealed. But it is believed that very little business was transacted under either of them. It is also probable that any equity that was administered at this time was not the technical and scientific equity of lawyers, but a sort of natural equity, consisting largely of the amendment of judgments at law which were considered too harsh. The judges had great discretionary powers, and were usually laymen. In fact there were very few trained lawyers in the Colony[2].

After this there were four more futile attempts to establish equity. They are chiefly interesting as showing the relations of the Colony to the mother country in the matter of the repeal of laws.

The first of these attempts was in 1690. The General Assembly limited the jurisdiction of the County Courts by enacting that they should hear equity cases only when they were under the value of ten pounds. The English Government repealed this Act in 1693. It was re-enacted the same year and re-enacted again in 1700; but apparently it produced no results[3].

In 1701 an Act remodelling the courts of the Colony, and apparently repealing all prior regulations in regard to equity, gave equity powers to the Courts of Common Pleas, and an appeal in equity cases to the Supreme Court. Nothing came of this Act and it was repealed by the home government in 1705[4].

In 1710 the General Assembly made another attempt. A Court of Equity was to be held by the Common Pleas judges four times a year in every county. Appeals could be taken to the Supreme Court, and questions of fact were to be settled by a reference to Common Pleas. This was repealed in 1713[5].

In 1715, a 'Supreme or Provincial Court of Law and Equity' was established. This was likewise repealed in 1719[6].

These were all failures. But in 1720, at the suggestion of Governor Keith, a separate Court of Equity was provided. It lasted sixteen years, and was not interfered with by the home government. It is to be observed that the other attempts were all law courts with an equity side. But this court, founded in 1720,

[1] Duke of Yorke's Laws, &c. 167, 168; Rawle, Essay Eq. in Penna. 9.
[2] M'Call, Judicial Hist. of Pa. 21, 27; Lewis, Courts of Pa. in Seventeenth Cent. 6; Brightly, Eq. in Pa. 29.
[3] Duke of Yorke's Laws, &c. 184, 225.
[4] Rawle, Essay Eq. in Pa. 11, 12; 1 Carey and Bioren, Laws of Pa. 33.
[5] 1 Carey and Bioren, Laws of Pa. 79.
[6] 1 Carey and Bioren, Laws of Pa. 110.

was the first and only separate Court of Equity Pennsylvania has ever had. Considerable business was transacted by it. But unfortunately for the court's existence the Governor was its Chancellor, and the colonists were so jealous of any power exercised by the King of England, or his representative the Governor, that in 1736 they brought to an end the only real Court of Chancery they ever possessed [1].

For the next hundred years—that is to say, until the final grant of equity powers in 1836,—the lovers of Chancery met with even less success. By the Constitution of 1776 they got for the law courts the powers of equity so far as related to perpetuation of testimony, obtaining evidence outside of the State, and the care of the persons and estates of the insane. The Legislature was at the same time allowed to grant such other Chancery powers as might be found necessary. But no other powers were granted, except a method of supplying lost deeds and writings, and a proceeding in the nature of a bill of discovery against garnishees in foreign attachment. The Constitution of 1790 mended matters by giving somewhat larger discretionary powers to the Legislature. But that conservative assembly exercised them only to the extent of letting the courts appoint and dismiss trustees, compel them to account, compel answers on oath in certain cases of execution, and when the vendor of lands had died, complete the contract of sale [2]. The inconvenience of this meagre grant was a little alleviated by the Legislature's appointing a 'Committee of Grievances,' which in cases of great hardship gave liberal relief [3].

Throughout the whole early history of Pennsylvania, it appears that there was always a party which wanted Courts of Chancery, and sometimes succeeded in getting them. This party was hindered in the colonial times by the British Government continually repealing the Colony's laws. They had an equally troublesome obstacle in the endless feuds between the colonists and their successive Governors [4]. These quarrels were so bitter and hard-fought that law-making and the execution of the laws were often forgotten. 'If we have lived free from open rapine,' said one of the Governors, ''tis more owing to the honesty of the people than any public provision made against it [5]!' Before and immediately after the Revolution the same party was thwarted by the jealousy which the people felt for any exercise of unusual power. And in later years they were opposed in the Legislature and throughout the State by another party. This new party took the ground that Chancery Courts were contrivances of

[1] Rawle, Essay Eq. in Pa. 19–53.
[2] Rawle, Essay Eq. in Pa. 59–61.
[3] McCall, Judic. Hist Pa. 25.
[4] There was also from the very first a small party which disapproved on principle of Chancery powers. Lewis, Courts of Pa. in Seventeenth Cent. 7.
[5] 2 Col. Rec. 312.

the Devil to defeat justice, and that Pennsylvania had a system of equity of her own, which was complete in itself, and would in time reform the world.

So, with the exception of the sixteen years from 1620 to 1636, the Courts of Pennsylvania were, for over a hundred and fifty years, left in this predicament—that, in an enlightened community whose trade and commerce were growing every day, they were obliged to administer justice without the aid of a Court of Equity. It is not surprising that they struck out into a new path and did something unheard of in the annals of Anglo-Saxon jurisprudence. If their action was a piece of judicial audacity, it was authorized and justified by the circumstances[1].

The precise time at which the courts began to administer equity through common law forms is not known. Some say it was done from the beginning[2]. The first reported case[3] on the subject was decided in 1768. It was an action of debt on a bond, and the defendant offered to prove failure[4] of consideration. The court admitted the evidence, saying, 'there being no Court of Chancery in this province, there is a necessity, in order to prevent a failure of justice, to let the defendants in, under the plea of payment, to prove mistake, &c.' The Chief Justice added, that he had known this as the constant practice of the province for thirty-nine years. In 1783 the case of *Kennedy* v. *Fury*[5] decided that a cestui qui trust of land could bring ejectment in his own name, the court observing that otherwise 'he would be without remedy against an obstinate trustee.' These decisions show very clearly how in certain plain cases, and to prevent intolerable hardship, the courts deliberately usurped the necessary powers.

The case of *Wharton* v. *Morris* (1785) displays a further development[6]. After reciting the lack of Chancery and the resulting grievous inconvenience, Chief Justice McKean says, 'This defect of jurisdiction has necessarily obliged the court, upon such occasions, to refer the question to the jury under an equitable and conscientious interpretation of the agreement of the parties.' He then goes on to inform the jury of the equities of the case. In the colonial times the equity thus charged to the jury was not technical. It was the so-called natural justice, named by Austin the '*arbitrium* of the

[1] Chief Justice Gibson, in *Torr's Estate* (2 Rawle, 253), said, 'As we cannot hope to see a separate administration of equity, we are bound to introduce it into our system as copiously as our limited powers will admit.'

[2] Brightly, Eq. in Pa. 5.

[3] *Swift* v. *Hawkins*, 1 Dallas, 17.

[4] In the report of this case it is stated that the defendant offered to prove *want* of consideration, but it has always been considered as a misprint for 'failure.' Rawle, Essay Eq. in Pa., 57.

[5] 1 Dallas, 72.

[6] Ibid. 125.

judge.' It is still almost the only rule of legal decision among the Turks and Arabs. Haroun-al-Raschid excelled in it. But in an advanced stage of civilization it is impossible. Its existence in Pennsylvania is very apparent in the leading case of *Pollard* v. *Shafer* (1787)[1]. The Chief Justice there says, 'A Court of Chancery judges of every case according to the peculiar circumstances attending it, and is bound not to suffer an act of injustice to prevail.' Equity, as a system in itself, with settled and unchanging rules, was apparently neither studied nor appreciated[2].

The dangers of charging equity to the jury were often felt. 'Before the Revolution,' said Mr. William Rawle, 'when the bench was rarely graced by professional characters, juries were almost the same as Chancellors[3].' Chief Justice Gibson said in *Lighty* v. *Short*[4], 'The greatest practical evil of the doctrine is, that it subjects the contract to the control of a jury, prone to forget that to cut a man loose from his contract from motives of humanity is the rankest injustice.' In his eulogium on Chief Justice Tilghman, Binney calls it, 'a spurious equity compounded of the temper of the judge and of the feelings of the jury, with nothing but a strong infusion of integrity to prevent it becoming as much the bane of personal security as it was the bane of science[5].' After the Revolution efforts were continually made—notably by Chief Justice Tilghman—to get rid of some of the evils of having the science of equity change with every new jury. The technical doctrines of the English Chancery were studied, and natural equity disappeared. In its reformed condition charging equity to the jury is still the law of Pennsylvania. The judge is the Chancellor, and the jury assist him by deciding on the weight of evidence and finding the facts. The judge may withdraw the case from the jury if satisfied that the testimony, even if believed, is not sufficient to establish the equity. If the jury disregard the equity laid down by the judge, the same remedy exists as when they disregard the law[6].

The next characteristic to be observed in the Pennsylvania system, is the rule which allows the defendant, in an action-at-law, to plead an equitable defence. This he may do by offering it in evidence (with notice) under the pleas of payment, non-assumpsit, or performance, which have become equitable pleas in Pennsylvania. If his defence does not properly come under one of these pleas he

[1] 1 Dallas, 212.
[2] Laussat, Essay Eq. in Pa. 89.
[3] Address to the Philadelphia Bar.
[4] 3 Pa. 451.
[5] 16 Serg. and R. 448.
[6] Wharton's note to 1 Dallas, 126; *Peebles* v. *Reading*, 8 S. & R. 484; *Kuhn* v. *Nixon*, 15 S. & R. 118; *Hawthorn* v. *Bronson*, 16 S. & R. 269; *De France* v. *De France*, 34 Pa. 385; *Church* v. *Ruland*, 64 Pa. St. 432; *Robinson* v. *Buck*, 71 Pa. 386; *McGinity* v. *McGinity*, 63 Pa. 38; *Todd* v. *Campbell*, 8 Casey, 252; *Faust* v. *Haas*, 73 Pa. 75; *Ballentine* v. *White*, 77 Pa. 20.

can set it up specially[1]. This method of working equity through common law forms was probably adopted at a very early date. The case of *Swift* v. *Hawkins* cited above, and decided in 1768, is an instance of an equitable defence admitted under the plea of payment. The court speaks of the custom as one of long existence. It is probable that this method and that of charging the equity to the jury, were the first contrivances for obviating the lack of Chancery powers. Allowing the defendant to set up an equitable defence was soon extended by allowing the plaintiff to rebut it[2]. By such means many opportunities were given in actions-at-law for the consideration of the principles of equity.

The next advance was to allow the plaintiff to begin proceedings by setting out in his declaration a purely equitable right, making the declaration somewhat resemble a bill in equity[3]. This practice was apparently not introduced until a rather late period, when the advancing civilization of the State had made the position of plaintiffs unbearable; for they could make no use of an equity except to rebut one used by the defendant. The first case was in 1791[4]. The plaintiff sued in debt on a bond, but at the trial was unable to make *profert* because the bond had been lost. A juror was withdrawn by consent and the case went over. The plaintiff then took a rule on the defendant to show cause why the declaration should not be amended by striking out the *profert* and averring the loss of the instrument. The rule was made absolute, and the plaintiff allowed to amend. The court gave the old reason, that there was no Chancery, and there would be a failure of justice unless some such arrangement were made. This decision was followed by similar ones, until it became a settled rule, that when the common law forms were inadequate, a declaration might be framed setting out the equity of the plaintiff and suited to the circumstances of the case[5]. It is very curious that, in 1789, only two years before this Pennsylvania case, Lord Kenyon made the same decision in England. It was the case of *Read* v. *Brookman*[6]. Austin cites it as a rare instance of liberal-mindedness in a common-law judge, and also as showing the absurdity of the distinction between law and equity[7]. Unlike the Pennsylvania case it remained solitary and did not become one of the starting points of a new system. So far

[1] Laussat, Essay Eq. in Pa. 66. Allowing the defendant at law to set up an equitable defence was adopted in England by the Common Law Procedure Act long after it had become the custom in Pennsylvania. 17 & 18 Vic. sec. 125; *Royal Society* v. *Magnay*, 10 Exch. 489.

[2] *McCulchen* v. *Nigh*, 10 S. & R. 344.

[3] Laussat, Essay Eq. in Pa. 43.

[4] *Commonwealth* v. *Coates*, 1 Yates, 2.

[5] *Lang* v. *Keppelé*, 1 Binney, 125; *Jordan* v. *Cooper*, 3 S. & R. 564.

[6] 3 Term Rep. 151.

[7] Austin, Jurisprudence, 636.

as appears by the report the English case was not cited in the argument of *Commonwealth* v. *Coates*.

The equitable rights of the plaintiff received a further extension by the turning of certain well-known common law actions into equitable ones. Thus ejectment became an equitable action, and the plaintiff without a special declaration could recover on a purely equitable title. The exact date of this innovation is unknown; but in the first reported case (1811) it is spoken of as an old custom[1]. The action of replevin was changed in the same way, and made to apply to every case of disputed title to goods[2]. The writ of *estrepment* with the aid of a little tinkering supplied the place of an injunction to restrain waste on land[3]. The foreclosing of mortgages was provided for by statute[4]. When a judgment-at-law was obtained unfairly, instead of resorting to a bill in equity, a rule was taken to show cause why the judgment should not be opened and the party complaining let into a defence on the merits[5]. The assignee of a right of action was always treated as the real plaintiff[6]. To complete the system, equitable rights in land were made subject to the lien of a judgment[7]. And finally, the Orphans Court, which may be described in a general way as a court having control of everything relating to decedents' estates, has always been, so far as its jurisdiction extends, a court with full equity powers[8].

Such were the methods by which the Courts of Pennsylvania tried to solve the problem that was forced upon them. They dug channels in the barriers of the common law, and through them they attempted to make the waters of equity flow. They succeeded to this extent, that in most law trials, equitable doctrines applicable to the case could be considered. But when it came to remedies, and the practical execution of the doctrines so considered, they signally failed. It is easy enough for a law court to say that it will hear equitable arguments and frame its judgments accordingly. But for carrying out those judgments, the common law method of execution offers no adequate substitute for the equitable proceedings of injunction, specific performance, *quia timet*, and discovery. It is in methods of administration that equity excels the common law, as much as, if not more than, in doctrine. The Pennsylvania law courts were daring enough to usurp the doctrine, but all their

[1] *Hawn* v. *Norris*, 4 Binney, 78; *Peebles* v. *Reading*, 8 S. & R. 484.
[2] *Weaver* v. *Lawrence*, 1 Dallas, 157; *Mead* v. *Kilday*, 2 Watts, 110.
[3] Purdon's Digest, 1465; *Byrne* v. *Boyle*, 37 Pa. St. 260.
[4] Purdon's Digest, 482. [5] Mitchell, Motions and Rules, 76.
[6] *Steele* v. *Phœnix Ins. Co.*, 3 Binney, 312.
[7] *Anwerter* v. *Mathiot*, 9 S. & R. 402.
[8] Laussat, Essay Eq. in Pa. 105; Purdon's Digest, 1103.

ingenuity could not obtain for them the practical remedies. Of course in many cases where equitable principles were applied, the common law method of damages and execution was enough; and if the defendant set up an equity which defeated the plaintiff, that ended the matter. But whenever specific performance was necessary, the only way of enforcing the equity (except in the cases of ejectment and replevin already mentioned) was by conditional damages. Thus in *Clyde* v. *Clyde* (1791), the plaintiff's right to a watercourse was disturbed by the defendant. The judge charged the jury to award large damages, and the plaintiff's attorney agreed to release them when the defendant should give a secure grant of the watercourse [1].

The sum of the whole matter is, that the courts contrived, by special declarations, pleas, &c., to bring up for consideration in law trials, the doctrines of equity; and they succeeded in partly administering those doctrines, in some cases by the ordinary common law methods, in others by conditional damages, and in others by such actions as ejectment, replevin, *estrepment*, rule to open judgment, &c., which they themselves invented or the Legislature invented for them. Here they stopped. They squeezed equity part way into the common law; but it would not go all the way. The whole subject of preventive justice was left outside. They never found a common law substitute for injunctions, bills *quia timet*, or discovery. Without these the administration of justice would in modern times be at a standstill.

Pennsylvania was not the first place where equity was administered through common law forms. The idea is said to be as old as the Year Books; and here and there in the common law isolated instances of it can be found. The law of bailments is in great part equitable; so is the action of *assumpsit* for money had and received; and the doctrines of relief from the penalty of a bond, of contribution among sureties, of discharge of the surety, by giving time to the principal, are all instances of equity administered at common law. There are also certain old and almost obsolete actions, which accomplish very much the same result as a bill in equity. The writ of *audita querela* prevents the improper enforcement of a judgment, the writ of *estrepment* prevents waste, *warrantia chartae* prevents a suit for land by any action in which the defendant cannot call on his warrantor, *curia claudenda* compels the owner of land to enclose it, *ne injusti vexes* prevents unfair distraint [2].

[1] 1 Yates, 92; Anon., 4 Dallas, 147; *Walker* v. *Butz*, 1 Yates, 575; *Moody* v. *Vandyke*, 4 Binney, 43; *Kauffelt* v. *Bower*, 7 S. & R. 81.

[2] Co. Litt. 100, a.

These and many other examples were often cited by Pennsylvania lawyers to show that the good old common law was equal to every emergency and all the principles of equity could be administered in it[1]. Laussat in his famous essay developed this point ingeniously. He proposed to revive the ancient writs, and if the courts were not bold enough to strip them of their technical absurdities, to persuade the Legislature to do it. In all cases which could not be covered by these writs or by the methods already in vogue, he suggested that the writ of *scire facias* be used[2]. He argued, that as there was no act, from the performance of which a party could not be called upon to show cause why he should not be enjoined, and as the writ allowed of the joining of all parties interested, there was no reason why writs of *scire facias* should not become complete substitutes for bills in equity. As a substitute for bills of account he offered to reform the old common law action of account render.

But neither the Legislature nor the courts followed these suggestions. The Pennsylvania system remained as it was, partly successful, yet unable to supply the needs of an active commercial state. Still there were those who loved it, and, when it was called a 'bungling substitute' or an 'hybridous monster without the virtues of either parent,' their wrath was kindled. Said Chief Justice Black in *Finley* v. *Aitken*[3], 'I think it not an ignorant prejudice, but high political wisdom, which caused our ancestors to refuse a Court of Chancery any place among their judicial institutions. . . . . The administration of law blended and mixed with equity principles was a happy conception. It was no "bungling substitute," but a most admirable improvement of both legal and Chancery practice. . . . . It is to be fervently hoped that we will not now extinguish the light by which the world has been walking.'

To this day there are good lawyers in the State who maintain that the Act of 1836, giving equity power to the courts, was unnecessary. It could have been dispensed with, they say, if the judges had only been a little more pliant and ingenious. Certainly it must be admitted, that, if we could have done without it, our State would stand alone in the juridical honour of having demonstrated that the distinction between law and equity is an absurdity. But the fact is otherwise. The people tried to do without equity, and after many attempts and more than a hundred years of consideration found that they could not. There is of course always the chance that the majority may be wrong. But the majority in

[1] An *Assize of Nuisance* as a substitute for an injunction was brought in Pennsylvania in 1809. *Livezey* v. *Gorgas*, 2 Binney, 194.

[2] Laussat, Essay Eq. in Pa. 126, 139.

[3] 3 Pittsburgh Leg. Journal, 2.

this case agreed with all the other majorities which have had to decide the same question.

Writers on jurisprudence tell us that our distinction between law and equity is illogical and unnecessary; judged by scientific principles it should not exist; that wherever equity appears, whether in Rome or in England, it is merely an historical accident; it is unknown in France, and would be unknown to us, if it were not for certain peculiar circumstances attending the infancy of our system. But on the other hand, it must be admitted that law, though in part composed of logical reasoning, is also a thing of growth, influenced by custom and individual opinions. If it has taken for itself a certain method of formation, it is in vain that you ignore or try to eradicate that method. The experience of Pennsylvania is a proof that equity, though unscientific, is in our law necessary and vital. It may make an unreasonable distinction; but still it is a form which the law has assumed, and to try to cut it out or join it to something else, is very much like attempting similar improvements on the human body. The modern codes, which turn all forms of action into one, have not been able to abolish the distinction. No code has ever enacted an abridgment of equity's principles; but, on the contrary, they are always adopted entire. It baffled the astuteness of the Pennsylvania judges to find a substitute for the preventive remedies of equity. The codes have met with no better success, and have taken injunctions, *quia timet* and the rest, with changed names perhaps, but without diminishing or adding aught in substance[1]. The great Mansfield thought he could amalgamate law and equity; and men not so great as he have had the same dream. But they are all alike in failure. Pennsylvania's attempt shows how far the distinction is meaningless and how far it is to be respected. The doctrines can be combined with legal forms, but not the remedies.

In 1830 the Legislature appointed a commission of three to revise the whole civil law of the State. These three men deserved well of the Commonwealth, and the eight reports they submitted to the Legislature remain as an everlasting monument to their skill. In no respect did they show themselves to better advantage than when they came to the vexed question of courts of equity. They were able lawyers and knew exactly what the Pennsylvania system was worth; and they had made up their minds that it was not equal to supplying the wants of the people. But being wise in their generation, they were careful to heap on it lavish praises, to call it a combination of all that was good; at the same time

[1] Bispham, Equity, sec. 14.

they thoroughly analyzed it, and quietly suggested that full Chancery powers be given the law courts in the following cases:—

(1) trustees, (2) trusts, (3) control of private corporations, unincorporated societies and partnerships, (4) discovery of facts material to any case, (5) interpleader, (6) injunction, (7) specific performance.

This included nearly the whole jurisdiction of Chancery, and was a severe commentary on the Pennsylvania system. The Legislature could swallow only part of it. In 1836 they gave to the Courts of Philadelphia alone all the equity jurisdiction suggested by the commissioners. To the rest of the State they gave jurisdiction only in the first three cases above mentioned.

But the ice was broken. In 1840 Philadelphia got Chancery power in cases of fraud, accident, mistake and account; and the rest of the State in cases of account. In 1844 Allegheny county got the same jurisdiction as Philadelphia. In 1845 Philadelphia was given equity power in dower and partition. And so it went on from one point to another until in 1857 the equity jurisdiction was made the same throughout the State. Since then and up to the present time there have been other, but less important, grants. In one or two of them Philadelphia has shown that she still possesses her ancient and superior influence with the Legislature[1].

This legislative grant does not interfere with the administration of equity through common law forms[2]. That system continues to exist, and is used whenever the occasion requires it. It has served and still serves a useful purpose. It was the result of hard necessity, and under the circumstances that attended the early days of the State no better arrangement could have been made. If it has failed of complete success it is a failure in attempting great things.

SYDNEY G. FISHER.

[1] Rawle, Essay Eq. in Pa. 70; Purdon's Digest, 589; Sixth Rep. of Com. to Rev. Civil Code.

[2] *Aycinena* v. *Peries*, 6 W. & S. 243; *Biddle* v. *Moore*, 3 Pa. 161; *Church* v. *Ruland*, 64 Pa. 432; *Corson* v. *Mulvany*, 49 Pa. 88.

ON THE LIMITS OF RULES OF CONSTRUCTION.

THE question that I propose to discuss in this paper, namely, how far a decision on the construction of one instrument is an authority on the construction of another, has received much attention of late years. Two opposite views are held, some lawyers consider that a decision on construction is so sacred that it must always be followed, under the penalty of throwing the whole subject into confusion, while others think that decisions on construction are useless—'you cannot construe one man's nonsense by another man's nonsense.'

I suppose that men who hold the extreme views that I have mentioned rarely adhere to them in practice. Men of the one school sometimes decline to follow a reported case, while men of the other school are apt to read the reported cases for the purpose of aiding them in coming to an opinion. I shall endeavour to shew that both these views are incorrect; that while on the one hand a decision on an isolated case is of very little assistance, on the other hand, where we find a catena of cases always putting the same construction on similar words occurring in an instrument of a particular class, we can deduce a rule from them for the construction of similar words occurring in an instrument of that class.

Almost every word in the language may bear more than one meaning, for instance 'unmarried' may mean 'never having been married' or 'not under coverture;' 'children' which generally means 'descendants in the first degree' may mean 'grandchildren' or 'great grandchildren:' the problem in every case of construction is to ascertain in which of its possible meanings the word is employed.

Three rules are used by lawyers for the purpose of ascertaining this meaning, and as they are used by lawyers they may be called rules of law, but the reader who has fully grasped the meaning of the rules will perceive that they exist independently of law, that they will lead us to the required result, and that no other rules will enable us to discover the meaning in which a word is used, in other words that they are necessary and sufficient rules for the purpose. The reader who is curious on the matter will find a somewhat imperfect attempt to deduce these rules from first principles in the author's 'Introduction to Conveyancing,' 3rd edit. p. 29.

The rules are the following:—

First. When the words used in an instrument are in their

primary meanings unambiguous, and when such meanings are not excluded by the context and are sensible with respect to the circumstances of the parties to the instrument at the time of execution, such primary meanings must be taken to be those in which the parties used the words.

Second. Extrinsic evidence is admissible for the purpose of determining the primary meanings of the words employed and for no other purpose whatsoever.

Third. Where the primary meaning of a word is excluded by the context, we must affix to that word such of the meanings that it may properly bear as will enable us to collect uniform and consistent intentions from the whole instrument.

In these rules, by primary, sometimes called literal, meaning is intended not necessarily the primary etymological (i. e. literary or dictionary) meaning, but either (1) the meaning usually affixed to the words at the time of execution by persons of the class to which the parties to the instrument belonged, or (2) the meaning in which the words must have been used by the parties having regard to their circumstances at the time of execution, or (3) the meaning which it can be conclusively shown that the parties were in the habit of affixing to them.

It follows that the primary meaning of a technical word in an instrument relating to the art or science to which it belongs is its technical meaning; thus in a legal document, wherever a word occurs which in law bears a technical meaning, that technical meaning, and not the popular meaning, if any, is the primary meaning for this purpose.

There is yet another rule used for the purpose of resolving equivocations, or as they are sometimes called, latent ambiguities; but it is not necessary to consider this rule for our present purpose.

At first sight it would appear that the existence of the first rule renders the existence of a rule of construction impossible. Persons who execute legal instruments are of all possible classes; their circumstances differ most widely; and they may habitually use words in different meanings.

A clergyman and a barrister are persons of different classes. They habitually use some words, such as conversion or election, in different meanings. When the clergyman is preaching a sermon and the barrister addressing a judge, their circumstances are so different that it is hardly possible that they can use the words in the same meaning.

But their circumstances might be such that they used the words in the same meaning; the barrister might use them in their

theological meaning if he were arguing a case of heresy, and the clergyman would use them in their legal meaning in his will.

It may be objected that I have taken an example of technical words used in a different sense by the same person under different circumstances, and that, although if the parties to a legal instrument use words which bear a technical meaning in law they must be assumed to have used them in that meaning, it by no means follows, if they use words which do not bear a technical meaning, that they both or all use them in the same meaning.

The answer appears to be that parties to the same instrument are temporarily in the same circumstances and must be assumed to have used the words in the same meaning. Otherwise they would not have been *ad idem*. I suppose that there may be cases in which on proof that the parties meant, in perfect good faith, different things by the words that they concurred in using, the instrument would be wholly inoperative; but this would be a rare and anomalous event.

How are we to find out the meaning in which any word is used in a legal instrument where there is nothing special in the circumstances of the parties? We may enquire in what meanings the same words have been used in similar instruments; in other words we may look at reported cases on the construction of similar instruments, and if we can find a sufficient number of decisions to make us fairly certain that we are correct, we arrive at a rule for the construction of that word as occurring in an instrument of a certain class.

It will be observed that a rule of this class for the construction of a word in an instrument of one nature is no authority for the construction of the same word occurring in an instrument of a different nature, because the circumstances of the parties are necessarily different. For instance the word 'unmarried' occurring in the provisions made by a father in his will for an unmarried daughter, conditional on her being 'unmarried' at a certain time, means 'being a spinster:' but the same word occurring in the phrase 'if she shall die unmarried' in the ultimate trusts of a lady's fortune in her marriage settlement, the only objects of which are to exclude the husband's marital right, means 'not under coverture.'

Rules of the class above pointed out present but little difficulty in their application. The only questions to be considered are, does the alleged rule exist, and is it excluded by circumstances or the context?

The simplest case of the application of the third of the fundamental rules is where an interpretation clause is employed. A

testator uses the words 'my trustees' all through his will, and explains that by 'my trustees' he means '*A* and *B* and the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of this my will.' Cases of this sort present no difficulty.

Cases occur however where the instrument contains inconsistent clauses, they arise from the draftsman not having had sufficient clearness of mind and brilliancy of imagination to perceive the facts existing and future that have to be provided for, or from his not being a master of the English language, or from his ignorance of the law. A common instance of this occurs in a will drawn by an ignorant person who uses 'issue' where he means 'children,' and then by a reference to the parents of the 'issue' shows that by 'issue' he means 'children.' Again proportions provided for children are divested on their deaths 'before their shares become payable,' where the context shows that what is meant is 'before their shares become vested.'

At first sight it may seem that cases of this nature fall under no rules, that you cannot construe one man's blunder by another man's blunder, we find however that there is a startling uniformity in error: the same words are omitted, the same superfluous words are inserted, and the same word is substituted for another, over and over again.

Where we find the same blunder repeated time after time in an instrument of the same nature, and the same construction placed upon it by the court, the conclusion is irresistible that that construction is correct: in other words we arrive at a rule of construction.

It may be objected that the blunder may occur in an instrument where the circumstances of the parties are different from those in the reported cases, and that the context of the instrument under consideration may differ from those that have received judicial construction. This objection does not affect the validity of the rule, it only alters the manner of expressing it. A rule of this nature may always be expressed as follows:—'Where a phrase *A* occurring in an instrument of a certain nature may mean *B* or *C*, and the phrase *D* occurs in the same instrument, *A* must be taken to mean *B*, unless the circumstances of the parties or the context of the instrument render that meaning impossible.

There is considerable difficulty in the application of rules of this nature, for it often happens that the phrases which occur in the instrument under consideration are not absolutely identical with those that are found in the reported cases, so that even if we can deduce a rule from the decisions, the question arises, do the words

of the instrument fall under the rule? Nothing but an educated judgment will enable the practitioner to determine whether the rule can be safely applied.

For example, it is a well established rule that where, by a marriage settlement, portions are provided for the younger children of a marriage, or personalty is settled on parents for life and afterwards on their children, and the children's shares are made payable as to sons at twenty-one and as to daughters at twenty-one or marriage, the settlement will if possible be so construed that every child on attaining twenty-one, or being a daughter on marriage becomes indefeasibly entitled to a share, whether it survives its parents or not. In a settlement of this nature there are two sets of clauses to be considered, the clauses of gift to the children and the clauses of gift over to others upon failure of the children; if both these clauses are clearly and unambiguously expressed they may exclude the rule. But the most minute inaccuracy in either clause, such that they do not quite fit each other, has been held sufficient to admit the rule. See the cases collected 3 Dav. Prec. 428; Elphinstone Norton and Clark 'On Interpretation,' 397.

It has been held that the rule applied where there was a gift over before the children's shares were 'assignable,' and a practitioner who was aware of this might feel very great difficulty in determining whether the rule applied (as in fact it does) where the gift over was before the share was 'payable;' for 'assignable' might mean either assignable to or assignable by the child, while 'payable' could only mean payable to the child.

The reader who agrees with me in the conclusions that I have endeavoured to draw, will see that, owing to the difference between the circumstances of a testator and those of a party to a deed, we cannot say that rules for the construction of wills are applicable to deeds and *vice versâ*. It sometimes happens that the circumstances are so nearly the same that the same rules apply, as for instance in the case of the rules as to portions charged on land, but in the absence of direct authority to that effect it is not safe to apply a rule for the construction of deeds to a will, or a rule for the construction of wills to a deed.

HOWARD W. ELPHINSTONE.

OFFENCES AGAINST MARRIAGE AND THE RELATIONS OF THE SEXES.

THE science of comparative jurisprudence, in the sense in which it is distinguishable from historical jurisprudence, is as yet in its infancy. Leibnitz projected a scheme for tabulating the laws of all the countries of the world, and showing their correspondence and differences in parallel columns; but the scheme was never carried out; and since then very little has been done for the comparison of laws, except in connexion with history. Comparative criminal jurisprudence in particular has received scarcely any practical treatment or concrete illustration, a fact which becomes painfully manifest whenever any new or remedial criminal legislation is taken in hand. A knowledge of the laws of other civilized countries is as essential for the lawyer and the legislator as for the jurist, philosopher, or moralist; and there can be no doubt whatever that, had our statesmen and legislators possessed but a moderate acquaintance with such laws, some few sections at least of the recent Criminal Law Amendment Act would have found a place on the Statute Book long ago, while others could never have been passed at all. Both inside and outside the House of Commons the discussions on the Bill were characterized by considerable misapprehension as to remedies which already existed under English law, and by a truly abysmal ignorance concerning the provisions of Continental and American law *in pari vel simili materia*.

I. ADULTERY. A few years ago a judge of the highest appellate court in one of the Provinces of British India, while reducing a sentence passed by a subordinate court for the offence of adultery, actually remarked from the bench that such prosecutions were to be deprecated, as adultery *did not constitute a criminal offence in the civilized countries of Europe!* Livingston has remarked, in his Introductory Report to the Louisiana Code of Crimes and Punishments, that he believes England to be the only country in which adultery is *not* a criminal offence. The State of New York appears to be an exception, as the criminal codes of that State were drawn up on the basis of English law. In France, both the wife and her accomplice are punishable with from three months' to two years' imprisonment, while the latter is liable, in addition, to pay a fine of from one hundred to two thousand francs. The husband is not punishable for simple adultery, but he may be prosecuted, on the

complaint of his wife, for keeping a concubine in the conjugal house, the penalty being a fine of from one hundred to two thousand francs; in Belgium he is further liable to imprisonment for from one month to one year [1]. Since the passing of the new Divorce Act, the French Government will probably have to make its action consistent by making the husband as well as the wife punishable for simple adultery. In Germany [2], adultery which has led to divorce is punishable with six months' imprisonment, both the guilty person and his or her accomplice being liable to prosecution. In India [3], the man who commits adultery with the wife of another is punishable with five years' imprisonment and fine; *but the wife cannot be punished as an abettor.* Here, then, are some striking differences, which afford ground for thought and discussion. Does it conduce to a people's well-being to make adultery a criminal offence? Does such a measure establish marital happiness on a surer and more secure basis? In India there can be little doubt that it does, and the penal sections are quite in accord with native opinion. The only matter for regret is the uncertainty with which these sections are worked, many European magistrates being loth to press them. Their action would probably be different, were it generally known that England is almost the only country in which adultery is not penal.

Adultery has been punishable in almost all ages and countries. In ancient times it was punished with the most extraordinary severity. By the law of Moses [4] both the offenders were stoned to death. According to the laws of Manu, the adulterous wife was to be devoured by dogs in a public place, and the adulterer burned slowly to death on a red-hot iron bed. According to some other Hindu books, the adulterer was mutilated and led naked through the streets mounted on an ass. By the ancient laws of England the nose and ears were cut off [5]; and even in more modern times the punishments inflicted by the Ecclesiastical Courts have been extremely severe, a fine of £500 being a common penalty. In one case a woman was fined £2000 'for notorious adultery [6].' Indeed, these courts appear to have exercised a sort of general supervision over morality akin to the censorship still exercised by caste panchayets in India. For instance, we read [7] that Augustine Moreland of Stroud was fined £500 for 'excessive drinking, swearing most desperate oaths, and blaspheming the name of God.' Sir James Stephen has remarked that this jurisdiction was so extensive that

[1] French Penal Code, 336-339; Belg. P. C. 389. [2] German Penal Code, 172.
[3] I. P. C. 497. [4] Lev. xx. 10; Deut. xxii. 22.
[5] Anc. Laws of Eng. 174. [The severe penalties of early law-books are often evidence of what the promulgators—kings, clerks, or Brahmans—would have liked to see done, rather than of what was actually done: but even that evidence is valuable. Bracton mentions a clerk at Oxford who was burnt for that 'apostatavit cum quadam Judaea.'—ED.]
[6] Calendar of State Papers, 1633-34, p. 418. [7] Ibid., 1634-35, p. 330.

the courts even interfered sometimes in quarrels between married people. Thus 'Nicholaus Elyott notatur officio quod non tractat Margaretam uxorem suam maritali affecione.' Many neighbours on both sides were called, and at last the husband was required to show cause why he should not be excommunicated. Indeed, the court extended its protection even to a mistress. John Ball not only lived in adultery with Margaret Sanfield, but said to her at last, 'If I see the speke eny more with him, I shall kutt of thi nose,' 'praetextu quorum verborum predicta Margareta est extra se jam posita et totaliter demens effecta.'

No abuse need necessarily result from the penalising of adultery, enticing away married women, and kindred offences, for the Legislature can always impose proper safeguards and restrictions. In France no evidence is permitted except *flagrant délit* and written correspondence. 'That Roman law,' says Montesquieu[1], 'which required the accusations in cases of adultery to be public, was admirably well calculated for preserving the purity of morals; it intimidated married women as well as those who were to watch over their conduct.' In another place[2] Montesquieu writes: 'The establishment of monarchy and the change of manners put an end to public accusations. It might be apprehended lest a dishonest man, affronted at the slight shown him by a woman, vexed at her refusal, and irritated even by her virtue, should form a design to destroy her. The Julian law ordained that a woman should not be accused of adultery, till after her husband had been charged with favouring her irregularities; which limited greatly, and annihilated, as it were, this sort of accusation.' In India a false charge is occasionally instituted by some man whose concubine has run away from him; but as evidence of reputation is excluded[3] in prosecutions under sects. 494, 495, 497, and 498 of the Indian Penal Code, and the fact of marriage has to be strictly proved, the falsity of such charges is easily detected. Hindoo husbands are not by any means too ready to institute prosecutions, which cover them with shame, and often cause their degradation from caste. Sometimes, when an adulterer is caught in the house, a brass utensil of some sort is tied in his cloth, the village watchman is summoned, and a charge is made at the police-station of lurking-house-trespass *with intent to commit theft*. The fact that the native police send up such cases as theft, though their investigation must have made them aware of the real facts, shows the direction in which their feelings and sympathies lie. Such charges are sometimes made even when the woman is a *widow* living as a member of a joint Hindoo family.

[1] Spirit of Laws, v. 7. [2] Ibid. vii. 11. [3] Ind. Evid. Act. s. 50.

Courts can only take cognizance of offences under sects. 497, 498[1] of the Penal Code on the complaint of the husband[2]; and if the latter persists in charging theft, and conceals the reals facts, a magistrate has no alternative but to discharge the accused. No doubt shame and fear of being outcasted constitute the principal motive for this *suppressio veri et suggestio falsi*; but it is probable that the Courts are in some respect to blame in discouraging *bonâ fide* complainants, and that the allegation of theft is partially due to the difficulty of procuring a conviction for the real offence. Unwillingness on the part of the judiciary to administer the law as it stands (no matter what their private opinion may be) can only lead to disastrous results. Those who do not know native society may suppose that husbands and wives are not likely to care for one another, married as they are when quite children. But this is not the case. Speaking generally, the Bengalee thinks there is no woman like his wife. The latter goes to her husband immediately she arrives at the age of puberty, and for a nubile daughter not to be married is an indelible disgrace to her parents. Celibacy is a rare anomaly, the result of religious vows, and seldom or never due to poverty. The married state is looked upon as a sacred bond, rendered necessary by the Hindu religion[3], and any attempts to destroy its happiness and security are regarded with extreme indignation both among the educated and uneducated classes. The repeal of the penal sections would virtually teach the people to be immoral, and, in the present state of Hindu society, would have the most disastrous results. The jealousy of the East arises not from love only, but from customs, manners, and laws, and even from religion. Such jealousy may be cold, and even joined with indifference and contempt, but it is always terrible, and thirsts for revenge. Already, in many cases, injured husbands or relations take the law into their own hands. If there were no law to resort to, crimes of violence would increase a hundredfold.

II. Bigamy. The elements which go to make up the offence of bigamy must necessarily be almost identical in all countries. Still, as regards the question of intention and extenuating circumstances, the decisions of various Courts exhibit some striking differences. Neither in England nor in India does the law apply to any person, whose former husband or wife shall have been continually absent and not heard of for the space of seven years. But, though seven years have not elapsed, there may still be a *bonâ fide* belief that

[1] Adultery and enticing, taking away, detaining married women with illicit intent.
[2] Crim. Proc. Code, 199.
[3] The word for son is *putra*, i. e. he who delivers from hell (*put*). If a man has no son of his own, he must adopt one.

the first husband or wife is dead; and Sir James Stephen, in his Digest of Crimes, suggests that a person may not be guilty under such circumstances. The proviso in 24 and 25 Vict. c. 100. s. 57 merely enacts that a second marriage, after seven years' ignorance as to the life of the first husband or wife, shall not be criminal. But it does not say that re-marriage within such period must under all circumstances be criminal. Lolly's case[1] appears to be a hard one. He was assured by several lawyers that his divorce was valid, married again, was tried for bigamy and convicted. The judges administered the law as they found it, and therefore do not deserve the fierce and intemperate denunciation with which Mr. J. G. Phillimore has visited them. Still it may be doubted whether the riper jurists of to-day would not show a greater consideration for ignorance of positive law[2], especially if it is at all ambiguous or difficult to ascertain. Lolly got his divorce from the commissary or consistorial court of Scotland, and it had been actually held that even a divorce *a mensa et thoro* in England was sufficient to bar a prosecution for bigamy[3]. In America the decisions of the Courts have been more just and liberal, and the Statute Law itself is not so rigorous. The period of absence is five years only, and no person, whose former husband or wife has been sentenced to imprisonment for life, can be punished for marrying again[4]. The new Divorce Act in France includes a 'severe criminal sentence' among the grounds for divorce. Mr. Lewis, in a recent article in the Fortnightly Review, has urged that the insanity of the husband or wife for a period of two years or a sentence of five years' penal servitude passed against either should be a ground for divorce. The sections of the Louisiana Penal Code[5] relating to bigamy seem to embody in clear and happy terms the suggestions of Sir James Stephen alluded to above. 'A person, having a wife or husband living, who shall, *without having a reasonable cause to believe such wife or husband to be dead*, contract a second marriage, is guilty of bigamy. Absence of first wife or husband for five years without intelligence is to be considered a reasonable belief of death.' The absence without intelligence is mentioned only as an illustration or example. In a case in Cali-

[1] *R.* v. *Lolly*, R. & R. C. C. R. 237.

[2] A man must be a good jurist as well as a good lawyer to make a good criminal judge. Such a maxim as *ignorantia legis neminem excusat* cannot be sweepingly applied. Grotius has well remarked in De Jure Belli et Pacis: 'Ignorantia legis sicut, inevitabilis si sit, tollit peccatum, ita cum aliquâ negligentiâ conjuncta delictum minuit.' It requires a fine discrimination and profound knowledge of the civil law to determine in what cases and to what extent intention may properly be ignored.

[3] This doctrine was questioned in Porter's Case (Cro. Car. 461), but the point was settled (1 East, P. C. c. 12). Lolly's prosecution was under Statute 2 Jac. I. c. 11, which has been since repealed by 9 Geo. IV. c. 34.

[4] N. Y. P. C. 299.

[5] Lou. P. C. 577, 578.

fornia[1], it was held that there could be no conviction for bigamy where the evidence as to the first wife showed only that she was alive three years before the second marriage. It seems to have been held that the lapse of three years was sufficient to shift on to the prosecution the onus of proving that the defendant had reason to believe his wife to be alive. This decision was perhaps unduly favourable to the defendant.

In India, customary law has to a great extent been ignored, and some Bombay decisions[2] in particular have ridden rough-shod over the well-ascertained customs of the lower classes. Treatises on personal law relate only to the higher classes, among whom divorce is unknown or unrecognized; and these principles have been ruthlessly applied to all classes, and even to semi-Hinduized aborigines. For instance, it has been held that a caste panchayet has no right to permit a woman to re-marry during the lifetime of her husband, whereas such re-marriages are under certain circumstances permissible. It appears harsh to punish parties for acting in accordance with the fiat of the only tribunal to which they have access, and the Calcutta High Court have at length recognized this fact[3]. When the husband refuses to give a *chor-chitthi* (release), it is very common for the caste panchayet to assemble and to permit the woman to re-marry, the ground generally being the impotency or incurable disease of the husband, sometimes his being a convicted thief and notorious *budmash* (bad character), and sometimes wilful and continued desertion and neglect to maintain. It may be remarked that impotency was a *canonical* disability under the former English law, a ground for divorce *a vinculo*, regarded as necessary *pro salute animarum* (1 Bla. Com., 440); and under the new Divorce Acts, a decree of *nullity of marriage* may be obtained from the Court on any ground which would have formerly justified the Ecclesiastical Court in granting a divorce *a vinculo* (Steph. Com. ii. 298). The lower classes have no Divorce Acts to refer to or Courts to resort to, and the jurisdiction of panchayets in social and religious matters should be treated with some consideration; indeed, in the absence of malice or improper motives, their decisions should not be impugned.

III. It may be useful to note some other offences against the relations of the sexes in connection with the recent Criminal Law Amendment Act[4]; and it may be premised that in some respects the Act does not go far enough, while in others it goes too far. The sins of omission appear to be due to the misdirected agitation

[1] 58 Cal. 218.
[2] 7 C. L. R. 354.
[3] 2 Bom. H. C. 124; 10 Bom. A. C. 381; I. L. R., 1 Bom. 347.
[4] 48 and 49 Vict. c. 69.

against a class, who are not responsible for the evils complained of. The causes of the evils are deep-rooted, and exist almost exclusively amongst the lower classes, a fact which was pointed out by Sir William Harcourt in the House of Commons. The lower classes have been led to believe that their daughters require greater protection against the rich; but, when the clouds of passion and prejudice have cleared away, it will be seen that it is against themselves that they require protection. I may instance two phases of immorality, which are rife among the lower classes,—each a very 'fons et origo malorum;' and yet they have been left untouched by the new Act:—

1. Seduction under promise of marriage.
2. Incest.

Incest is notoriously due to overcrowding among the poor, while seductions among domestic servants and shop-girls are effected by men of the same position as themselves. Surely the best way to drive young girls off the streets is to remove these glaring and palpable causes of their being there. It may do more harm than good to punish certain effects without rendering penal the radical causes which produce such effects. The evils complained of are partly the result of causes beyond the reach of legislation, but the above-mentioned phases of immorality are well within its reach, and should have been rendered penal.

Incest.

'The only reason,' says Sir James Stephen, 'which I can assign why incest in its very worst forms is not a crime by the laws of England is that it is an ecclesiastical offence, and is even now occasionally punished as such. It is, I believe, the only form of immorality which in the case of the laity is still punished by ecclesiastical courts on the general ground of its sinfulness.' Every person who commits incest, adultery, fornication, or any other deadly sin (not punishable at common law), is liable, on conviction in an ecclesiastical court, to do penance, and to be excommunicated, and to be imprisoned for six months [1]. Archdeacon Hale mentions the following as offences cognizable by the ecclesiastical courts, *incest*, bigamy, *acting as a procuress*, procuring abortion, and overlaying children. Incest is the only offence which is ever prosecuted in these days, and that very rarely. As the ecclesiastical jurisdiction has become almost obsolete, and will soon be entirely so, the worst forms of incest should be declared penal by the statute-law. Sec. 302 of the New York Penal Code enacts

[1] 13 Edw. I. c. 4; 53 Geo. III. c. 127. ss. 1–3. See also Phillimore's Eccl. Law, 1081, 1442.

that 'when persons, within the degrees of consanguinity, within which marriages are declared by law to be incestuous and void, intermarry or commit adultery or fornication with each other, each of them is punishable by imprisonment for not more than ten years.' The Pall Mall Gazette [1], speaking of the corruption of girls under thirteen, says 'it is most prevalent in the overcrowded quarters of large towns, *where it is very often complicated with incest.*' It is to be hoped that some improvement may be effected by the Act for the Housing of the Working Classes (48 & 49 Vic. c. 72).

Seduction under promise of Marriage.

Livingston remarks, in his Introductory Report to the Code of Crimes and Punishments for Louisiana: 'Seduction is not, I believe, punishable in England, unless preceded by a conspiracy. Yet, if we consider the base profligacy of the act, by which the most implicit confidence is destroyed, and the most solemn promises are deliberately broken, not only to the utter ruin of the unsuspecting victim, but to the disgrace and misery of her connexions, it is one in which the immorality of the act and the misery it inflicts both require exemplary punishment.' Sec. 342 of the Louisiana Penal Code punishes the seduction of a woman of *good reputation under promise of marriage*. Sec. 284 of the New York Penal Code enacts that 'a person who, *under promise of marriage*, seduces and has secret intercourse with an unmarried female of *previous chaste* character, is punishable with imprisonment for not more than five years or with fine not exceeding 1000 dollars or both.' The subsequent intermarriage of the parties, or the lapse of two years after the commission of the offence, is a bar to a prosecution. In Germany, the seduction (no promise of any sort necessary) of a chaste girl under the age of sixteen years is punishable with one year's imprisonment [2]. The Criminal Law Amendment Act has overstepped the bounds of sound legislation in rendering penal the mere act of connexion with a girl under sixteen years of age, though such girl be of known immoral character, and may have been the actual seducer. But all right-minded men will agree that the seduction of a chaste girl *under promise of marriage* should be made a criminal offence. Such seduction could actually be punished in India as cheating [3]. But sec. 3. (2) of the new Act will not cover such a case.

[1] Pamphlet—Vigilance Committees and their work, p. 22.

[2] Germ. P. C. 182.

[3] Sec. 415, Indian Penal Code: 'Whoever, by deceiving any person . . . . *or* intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, *mind, reputation* or property, is said to cheat.' To induce a Brahman to marry a woman of low caste, by representing her to

In England false pretences and false representations do not in law cover false promises to perform some act in the future: it is necessary that they should relate to some existing fact. Of course some such restrictions should be imposed as to prevent the institution of false charges. In New York[1], for instance, no conviction can be had for seduction upon the testimony of the female seduced, if unsupported by other testimony; and it has been ruled that the corroboration must be as to promise and intercourse, not as to chastity or being unmarried[2].

The principal provisions of the new Act are as follows:—

1. It is felony to have unlawful connexion with girls under thirteen.

2. It is a misdemeanour to have unlawful connexion with girls between thirteen and sixteen.

3. It is a misdemeanour to abduct a girl under eighteen.

4. It is a misdemeanour to procure for illicit intercourse a girl under twenty-one, who is not of known immoral character.

With regard to the first two offences, it appears from police reports in the newspapers that the lower classes are already receiving a very rude awakening. Indeed, Vigilance Committees will find they will have more than they can do, if they hope to cleanse the Augean stable of the East-end of London, where juvenile immorality is due to deep-rooted social evils. As regards the corruption of girls between thirteen and sixteen, it appears quite possible that a reign of terrorism may spring up. Common prostitutes under sixteen will be able to extort money from men who have had intercourse with them. It may be said that girls under that age should and will be avoided; but in many cases girls over sixteen may falsely understate their age, and extort money under a threat to bring a case. The mere threat of publicity will generally suffice. Again, no father will employ girls under sixteen where there are young boys in the house. A corrupt domestic servant may not only seduce her master's son, but may add insult to injury by levying blackmail. These girls will find it far more difficult to get employment. It is no doubt very advisable that all girls under sixteen should be taken off the streets; but the question is how the rescue societies are to provide for them in the present state of the law. Their accession to the ranks of the Salvation Army will not tend to enhance the already exceedingly doubtful reputation of that body.

The section as to the abduction of girls under eighteen is not open

be a Brahman, would amount to cheating, even though no money should be paid in consequence of the misrepresentation. See Bengal Weekly Reporter, Cr. v. 98.

[1] N. Y. P. C. 286.

[2] *Armstrong* v. *People*, 70 N. Y. 38; *People* v. *Kenyon*, 5 Park. 254.

to any serious objection. It is necessary that the girl should be taken 'out of the possession of and against the will of her father or mother, or other person having the lawful care or charge of her.' Infamous or necessitous parents will doubtless abuse the provisions of this section. They will allow their daughters to be kept or taken by procuresses and then they will have ample opportunity for extortion. The danger lies in the fact that in England false charges and perjury are so seldom punished. If there were systematic prosecutions in such cases, as in India, the danger would be very much minimized. Several sorts of abduction were already punishable under English law, viz. (1) abduction of unmarried women of any age for lucre; (2) abduction of girls of property under twenty-one; (3) abduction of women with or without property, in which case it is necessary to prove a forcible taking away or detention against the woman's will; (4) abduction of girls under sixteen without property.

Procuration of Girls under Twenty-one.

The clauses as to procuration for brothels merely extend the existing law. Two or more persons are always implicated in such procuration; and it was already a misdemeanour to conspire to persuade a woman to become a common prostitute (*R.* v. *Howell*). A conspiracy to procure by false pretences connexion with a young female is also indictable. But the first clause of section 2 is quite new, and, I venture to think, indefensible. The clause is so general as to be perhaps unworkable; but, if worked at all, it will cause far more harm than good. The mischief of the old law was that *habitual* instigation or facilitation of debauchery *for gain* was unpunishable. It would have been quite sufficient to have provided against this mischief. *Naturâ nihil fit per saltum;* and in this respect legislation should imitate nature, whereas the present clause has made a tremendous bound forward far in advance of the requirements of public morality. This is but one instance of the importance to lawyers and legislators of a knowledge of the criminal laws of other countries on the same subject-matter. Section 334 of the French Penal Code[1] is as follows: 'Whoever *habitually* excites to, instigates, or facilitates debauchery or the corruption of youth of either sex under the age of twenty-one years is punishable with imprisonment from six months to two years. If the offender be the father, mother, guardian, etc., the punishment is from two to five years.' Persons convicted under these sections are deprived of certain family rights, and may be placed under police supervision,

[1] See also s. 379, Belgian Penal Code.

while the parents are deprived of the authority which the law[1] gives them over the person and property of the child. The Court of Cassation in Paris has ruled that these provisions are not applicable to those who wish only to satisfy their own passions, and are not intermediate agents[2]; but they are punishable if they give gifts or make promises to such intermediate agents[3]. In Germany[4] the latter are punishable, if they facilitate debauchery *habitually or for an interested motive*. The Louisiana Code also makes procuring *for gain* a criminal offence, and Mr. Livingston, the author of that Code, remarks in his Introductory Report: 'Although the private excesses of the passions between the sexes cannot with propriety be made the subject of penal law, yet public opinion in all nations has marked by its decided reprobation him who, without being excited by his own passions, ministers to those of others *for gain*, and in that vile office frequently seduces innocence, or purchases the influence of infamous or necessitous parents to the dishonour of their child. The indication of public sentiment has on this occasion been pursued, and the act has been made penal by the Code.' If such legislation is called for in England, it should be milder and not more severe than the law in countries like France, Italy, and Spain, where unmarried girls enjoy but little liberty, and go-betweens are in consequence more required and more employed. In England, such procuration is unheard of among the upper and middle classes, and as for the lower classes, their daughters enjoy so much liberty, that the intervention of third parties is not called for. Their yielding to or resistance of temptation must depend entirely on themselves. The remark made above as to France, Italy, and Spain applies with tenfold force to India, and indeed to all Eastern countries. If the words 'habitually and for gain' were added, the clause in the new Act might perhaps with some advantage be extended to India; but if put into operation as it stands, it would result in the imprisonment of the whole female population over a certain age. In India procuration is an ingrained habit, the custom of the country, and the illicit intrigues fostered and facilitated by old women constitute a most fruitful source of assaults, woundings, and even murders. If it is found necessary to punish instigation to and facilitation of debauchery in France, Italy, and Spain, much more is such a measure called for in India, where, speaking generally, the want of opportunity engendered by the zenana system is almost the only check on unchastity. One of the Chinese classic authors[5] considers the man as a prodigy of virtue

[1] Code Civil, Bk. i. ix. de la puissance paternelle.
[2] Cass., 24th March, 1853, *et aliunde*.
[3] Cass., 10th Nov., 1860.
[4] Germ. P. C. 180.
[5] See Du Halde, vol. iii. p. 151.

who, finding a woman alone in a distant apartment, can forbear making use of force. A great philosopher has remarked that 'when the physical power of certain climates violates the natural law of the two sexes, and that of intelligent beings; it belongs to the legislature to make civil laws, with a view of opposing the nature of the climate, and re-establishing the primitive laws[1].' The same author remarks in another place[2]: 'There are climates where the impulses of nature have such force, that morality has almost none. If a man be left with a woman, the temptation and the fall will be the same thing; the attack certain, the resistance none. In these countries, instead of precepts, they have recourse to bolts and bars.' So in India it is scarcely considered possible that a woman, having liberty, could remain chaste. If she has been in such a situation that she had the opportunity of being unchaste, it is presumed that she has been so. In Bengal, old women do much harm by corrupting young wives and widows, and their visits to the houses of well-to-do people are regarded with the utmost suspicion. They constitute indeed a 'belli teterrima causa,' and assaults arising therefrom frequently find their way into the courts, though it is sometimes difficult to ascertain the motive for the assault, as the old woman complainant does not mention it, and the accused denies the assault. Secluded as women are, they are accessible to go-betweens in the shape of maid-servants, female pân-sellers, the washerwoman, old women who go to husk paddy, and the female barber who cuts the nails of the women of the family and paints their feet with the red henna. It would be well for the security of marital life if some provision similar to that in the French and Belgian Codes were extended to Bengal. It may be safely affirmed that the majority of poor old women in Bengal, who have to earn their own living, eke out a scanty sustenance by facilitating intrigues, or at least are ready to do so. Indeed, so prevalent and ingrained is this habit, that a civilian of unusual experience and knowledge of the people once humorously remarked, that the fact of every old woman in Bengal being a procuress should be regarded as an irrebuttable presumption of law!

In conclusion, it may be remarked that whatever good is effected by the new Act, it will be but infinitesimal compared with the grievous mischief already wrought by the Pall Mall Gazette and similar publications. That the open sale of such garbage should be permitted in crowded streets is a disgrace to a civilized country. One cannot touch pitch without being defiled, and it is to be feared that sensual ideas have been implanted in many young minds where they never existed before. That firms existed for the

[1] Montesquieu, Esp. des Lois, Bk. xvi. 12. [2] Ibid., Bk. xvi. 8.

procuration of virgins was a surprise even to 'club-men and aristocrats.' However, if such firms do exist, they could not have had a better advertisement. But it is thought by some who have good means of knowledge that the so-called revelations are founded on the misdeeds of a very few depraved persons. Energy would have been better spent in bringing those persons to justice. As it is, the paths to immorality have become broad and easy roads with large and legible guide-posts to prevent any one possibly going wrong, or rather going right. Young girls are being sedulously taught how they may part with their virtue with the greatest advantage. Where one hitherto may have yielded to temptation on the impulse of the moment, a hundred will now forsake virtue in cold blood from greed of lucre. The Pall Mall Gazette has shown how poor girls may go and earn £5 and then *return to service as if nothing had happened!* Verily, here is the mark of the beast. Juvenal remarked that no one ever becomes corrupt *all at once—nemo repente fuit turpissimus olim.* He would probably see cause to modify this assertion, if he lived in these days of indecent literature, when foul prints are scattered broadcast, and filthy descriptions are dinned into the ears of young girls, graphically pointing out the extreme facility of the descent to Avernus, and the profits to be derived therefrom. 'Virginibus puerisque canto' appears to be the motto of these publications. '£5 for a virgin warranted pure!' is a specimen of the placards exhibited in the streets. I can vouch for the truth of the following occurrence. Two modest young girls of about fifteen were waiting for an omnibus outside the Charing Cross Station. Their eyes being attracted by the huge placards and pictures of or in imitation of the Pall Mall Gazette, one of the hawkers cried out: 'Come on, Miss, 'ave a copy. This 'll show yer 'ow to earn five pounds!' Such a remark, made to a woman in India[1], would be punishable with one year's imprisonment and fine. The Pall Mall Gazette alleges that its motives are pure and good; but every sane man is presumed to intend the probable consequences of his acts, and such an allegation savours of the whining plea *ad misericordiam* of the prisoner who has been convicted and sentenced to a flogging.

The criminal immorality, which the new legislation is intended to meet, exists in all its virulence among the lower classes, and much good may be effected, if Vigilance Committees will direct

[1] I. P. C. s. 509: 'Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.'

their efforts towards the removal of this social cancer. Speaking generally, 'club-men and aristocrats' are guiltless of such criminal vices, and it is absurd and unreasonable that they should be condemned owing to the monomania of a few 'Pall Mall Gazette Minotaurs.' It is enough to make an ordinary mortal shudder to read the account given by the 'Chief Director of the Secret Commission' of his criminal intrigues and cold-blooded machinations. If such account be not exaggerated, then 'Our Secret Commissioner' must himself be a veritable Minotaur, and a sentence of penal servitude for life would not be too severe for him.

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REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

The Patriarchal Theory. Based on the Papers of the late JOHN FERGUSON MCLENNAN. Edited and completed by DONALD MCLENNAN, M.A., of the Inner Temple, Barrister-at-Law. London: Macmillan & Co., 1885. 8vo. 354 pp.

THIS book is in substance, though not in form, one of those unsatisfying productions—a book left unfinished in consequence of the death of its author. Owing to the failing health of the late Mr. McLennan, this work was commenced by him in co-operation with his brother. After his death the treatise was completed with the aid of notes embodying his views upon the subject. A portion alone is put forward upon the responsibility of the editor, though it probably follows out the direction of Mr. McLennan's ideas. In appearance therefore there is nothing fragmentary in the work as finally presented to the public. In truth, however, it is only the portal of a larger building, designed by an architect who has carried his plans with him to the grave. This treatise, so far as it embodies the ideas of the late Mr. McLennan, is purely destructive. It was intended to overthrow the views of a particular author. When these had been cleared away, Mr. McLennan had intended to fill up the blank by a great constructive treatise, enforcing his well-known theories as to the origin of society by a more extensive body of evidence, and by new explanations and suggestions. This work was never commenced. Not even a hint appears to have been left behind as to its character or scope. So far as Mr. McLennan's teaching took a constructive form, it has not been advanced by the present volume. Our object is, not to examine or discuss his general views, but to consider how far the work before us has strengthened or altered the argument in their favour.

Sir H. S. Maine, in his well-known work on Ancient Law, had put forward that view of the primeval condition of the human race which is known as the Patriarchal Theory. 'Society in primitive times was not what it is assumed to be at present, a collection of individuals. In fact, and in the view of the men who composed it, it was an aggregation of families. The contrast may be most forcibly expressed by saying that the unit of an ancient society was the Family, of a modern society the Individual.' 'The elementary group is the Family, connected by common subjection to the highest male ascendant. The aggregate of Families forms the *Gens* or House. The aggregation of Houses makes the Tribe. The aggregation of Tribes constitutes the Commonwealth.' The supremacy of the ruling male ancestor over the junior members of the family Sir H. S. Maine designated by the term of Roman law, *Patria Potestas.* The preference for direct male heirs over kindred claiming through a female, which had its extreme form in the Roman system of Agnation, he deduced as a necessary result of the *Patria Potestas.* In some states of society both were found existing together. In others, from finding a preference for Agnatic heirship, he inferred that a *Patria Potestas,* of which no other trace remained, must have formerly prevailed.

Mr. McLennan's antagonistic theory was stated by himself in a former work (Studies in Ancient History, p. 235) in the following propositions:—'(1) that the most ancient system of heirship in which the idea of blood relationship was embodied was the system of kinship through females only; (2) that in the advance from savagery this system was succeeded by a system which acknowledged kinship through males also, and which (3) in most cases passed into a system (agnation) which acknowledged kinship through males only; finally (4), that agnation broke down, and there was again kinship through females as well as through males.'

Now, upon a mere inspection of these rival theories, it is obvious that they have much in common. Mr. Donald McLennan does not deny that the Patriarchal Family in its strictest form did exist in antiquity, though, upon the authority of Gaius, he limits it to the Romans and the Asiatic Galatae. It is part of Mr. J. F. McLennan's theory that social life inevitably reached a stage in which kinship through males, and even through males only, became the accepted rule. On the other hand, Sir H. S. Maine nowhere claims for his theory that it is one of universal application. He admits to the fullest extent the existence amongst many races of promiscuity and polyandry, and of that habit of tracing kinship through females which results from such practices. In his latest work (Early Law and Custom, p. 204) he says, 'There are unquestionably many assemblages of savage men so devoid of some of the characteristic features of Patriarchalism, that it seems a gratuitous hypothesis to assume that they had passed through it.' In his Early History of Institutions (p. 65) he expressly limits the prevalence of the Patriarchal system to the Aryan and Semitic races, and to 'that portion of the outlying mass of mankind which has lately been called Uralian—the Turks, Hungarians, and Finns.' Even among these races he admits that 'if they suffered from a scarcity of women, such phenomena as polyandry and a tracing of kinship through women would probably shew themselves, and at any stage of social growth' (Early Law and Custom, p. 220). The variance between the two writers is, that Mr. McLennan asserts that every race whose family system is founded on kinship through males, has passed through an antecedent stage in which kinship was traced through females, and that this earlier family system was itself the necessary result of a relationship between the sexes, which commenced in promiscuity, and passed through successive phases of polyandry, until monogamy or polygamy was ultimately reached. Sir H. S. Maine denies, as regards the higher and, as he terms them, the more respectable races, that any such antecedent stage can be shown to have had an invariable existence; still more that it can be shown to have had a necessary existence. This, as he himself points out, is the whole question at issue.

The first step by which the authors of 'the Patriarchal Theory' proceed to the demolition of the author of Ancient Law, is to establish that neither *Patria Potestas* nor Agnation can be found among any of the nations, other than the Romans, among whom Sir H. S. Maine professed to have traced its existence; that is to say, not amongst the Hebrews, the Hindus, the Slavs or the Irish. This, of course, would be a very weighty *argumentum ad hominem*, if it were made out. On examination, however, the proof only purports to remove, or render improbable, the existence of a *Patria Potestas* or Agnation which Sir H. S. Maine had never asserted. Mr. McLennan quotes the following passage from Ancient Law (p. 123) as defining that *Patria Potestas*, whose existence he then proceeds to deny. 'The eldest male parent—the eldest ascendant—is absolutely supreme in his household. His dominion extends to life and death, and is as unqualified over his children

and their houses as over his slaves; indeed, the relations of sonship and serfdom appear to differ in little beyond the higher capacity which the child in blood possesses of becoming one day the head of a family himself.' This of course is technically true of the early Roman father. In the passage where it occurs it is only asserted to be true of the Hebrew Patriarchs, so far as their usages may be collected from the early chapters in Genesis. It is even pointed out that at the time of Jacob and Esau there are traces of the first breach effected in the empire of the parent, and of an order of rights superior to the claims of family relation. It may possibly be that, even as regards the early Hebrew Patriarchs, the paternal power was over-stated. It is nowhere asserted that a power of this extent continued among the Hebrews, or existed elsewhere. In the Early History of Institutions (p. 310) it is said of the Patriarchal Family, 'The group consists of animate and inanimate property, of wife, children, slaves, land and goods, all held together by the despotic authority of the eldest male of the eldest ascending line, the father, grandfather, or even more remote ancestor.' In Early Law and Custom (p. 193), the Patriarchal theory is stated as 'the theory of the origin of society in separate families, held together by the authority and protection of the eldest valid ascendant.' It is expressly admitted (Ancient Law, p. 150) that 'the powers themselves are discernible in comparatively few monuments of ancient law, but agnatic relationship, which implies their former existence, is discoverable almost everywhere.' The question, and the only question of importance, is, whether the family system of the higher races at the earliest dawn of history does not disclose a father, capable of being identified, recognised and reverenced by his descendants and dependants, and whether the existence of such a father is not inconsistent with a rival theory of society, which negatives the possibility of such a father.

Again, as regards Agnation, the authors of 'The Patriarchal Theory' seem to assume that Sir H. S. Maine had asserted that it existed, among all the races to whom he refers, in its strictest acceptation, to the exclusion of all females, or persons claiming through females. Naturally they triumph over and trample upon him by the demonstration that the contrary was the fact. But this is a purely gratuitous assumption. In his Ancient Law, Sir H. S. Maine pointed out (p. 149) that the natural result of a family being held together by paternal authority would be, that the limits of the family would not extend beyond the limits of the authority. Consequently that the offspring of females would, while the system continued unrelaxed, not be heirs. He expressly stated (p. 152) 'that Primitive jurisprudence, though it does not allow a woman to communicate any rights of agnation to her descendants, includes herself nevertheless in the agnatic bond.' In Early Law and Custom (p. 193) he said, 'we have not indeed knowledge of any working system of institutions in which the family exactly corresponds to the primitive family assumed by the theory.' In p. 115 of the same work he noticed, and founded an important argument upon, one of the phrases of Hindu law, in which it admitted cognates in preference to agnates of a very near degree. It is of course familiar knowledge that the strict rule of agnation was relaxed in Roman law by the action of the praetor. What is material, and what is alone material, to Sir H. S. Maine's argument is to show that the rules of inheritance in any particular race favoured the direct descent through males, and assumed that at each stage the evidence of paternity was clear and undisputed. When we find the Jewish writers setting out a series of genealogies which trace an unbroken line of male descents from Adam to Christ; when we find the Hindu Princes of Oode-

pore professing to possess a similar unbroken pedigree from the Sun to the present time; the tables of descent may be genuine or fictitious, but one thing is quite certain, that those who put them forward never imagined there had been a time when descent was traceable, if at all, only through females, because fathers had not been found out.

It seems to us that the whole of this branch of Mr. McLennan's argument is based upon what the old logicians used to call an *ignoratio elenchi*. Assume to the fullest degree that any system of inheritance admits the heirship of females and of persons claiming through females. If this system was, so to speak, an original system, and not merely a transition or a development, it might militate very strongly against Sir H. S. Maine's view that agnation is at first the necessary result of a patriarchal family. But if in each case the heirship is traced to a known male, what assistance does it give to Mr. McLennan's theory? Grant that a daughter may succeed to her father, or a daughter's son to his maternal grandfather; how does this prove, or tend to prove, that there ever was a time when a daughter succeeded to her mother, or a daughter's son to his grandmother, because the father or grandfather was unascertained and unascertainable? If it does not prove this, it proves nothing which can be of any service to Mr. McLennan.

Throughout all Sir H. S. Maine's works written since his own personal acquaintance with India, he has relied very strongly in support of his theories upon the evidence furnished by Hindu law. Naturally so. In the first place the evidence is itself open to no dispute. Hindu law is a living system which is being administered every day by our own countrymen to the natives of India. Its principles are set forth in a number of authentic writings, extending from a period of immense antiquity almost down to the present century. But to the student of comparative jurisprudence, Hindu law is of inestimable importance for another reason. The Hindus are only one of the many offshoots of the great Aryan stock, which cast off as its collateral branches, Greeks and Romans, Teutons, Slavs and Celts. When we find in any two or more of these races similar principles, such as ancestor-worship, paternal supremacy, adoption, preference of male heirs and the like, we may safely assume that a similar principle existed in the original race from which all have equally descended. And so from the almost unbroken record of Hindu law, we may fill up blanks in the legal history of the kindred races, with the same certainty as that which enables the palæontologist to pronounce upon the missing bones of an imperfect fossil from the completer skeletons unearthed in coeval strata.

Of course the Messrs. McLennan were perfectly aware of the importance of Hindu law to their argument. If its evidence told wholly in favour of their opponent, it would be necessary to interpret in a similar manner the more obscure or fragmentary data derivable from the related systems. If it could be wholly wrested to their side, it is hardly too much to say that every opposing theory based on Aryan usage would crumble away. It will be necessary, therefore, to examine in some detail the process by which the authors of the Patriarchal Theory attempt to make out that Hindu law does not establish the existence of paternal supremacy and descent through males, and that its rules are only explicable on the assumption of a pre-existing period of promiscuity, polyandry, and kinship through females.

First then as to Paternal Supremacy. Our authors maintain (ch. v.) that there was no *Patria Potestas* among the Hindus, because the head of the family could not kill or sell his wife or children; because the junior males, and even the females, of the family could hold property over which he had no control;

and because, even over the family property, the junior males had rights, amounting in some cases to a right of exacting a share during the father's life. This is all quite true, and proves that the Paternal Supremacy of a Hindu father fell very far short of that of a Roman father. It does not show that it did not exist. No one would deny that an English father is despotic over his children while of tender years, or that till lately he was despotic over his wife; yet no one supposes that he can kill or sell them, or that they are incapable of holding separate property. Let us see what the position of a Hindu father really is.

There are two principles of Hindu law which are apparently, though not really, in conflict. One is the corporate character of the family property; the other is the paternal authority. The normal condition of a Hindu family is that all its male members are joint owners of the whole family property. If they continue, as they often do, for many generations without exercising their right of partition, the joint family consists of as many males in the direct line of descent as the duration of human life allows, and of a perfectly unlimited number of collaterals. The manager of the property for the time being is generally the eldest male, or the eldest of the eldest branch. As regards the collateral relations the manager is merely an agent, with no higher powers than the law would vest in the director of a company. He cannot sell or mortgage the family property, or incur debts upon its credit, except for purposes beneficial to it. According to the strict law, which is still enforced over the greater part of India, he cannot even sell or mortgage his own share for his own individual purposes.

When, however, we examine the position of the same manager as regards his own immediate family, consisting of his wife, daughters, and male issue to the third generation, his powers are very different. We have evidence that in very early times they were far more extensive than they are now. Manu says, 'Three persons, a wife, a son, and a slave, are declared by law to have (*in general*) no wealth exclusively their own; the wealth which they may earn is (*regularly*) acquired for the man to whom they belong.' (Manu, viii. § 416. The words in brackets are a gloss of Kulluka, and do not occur in the original.) Narada says of a son, 'He is of age and independent, in case his parents be dead; during their lifetime he is dependent, even though he be grown old.' (Narada, iii. § 38.) To the present day it is stated by Dr. Hunter that among the Kundhs of Orissa 'in each family the absolute authority rests with the house-father. Thus the sons have no property during their father's life.' (Hunter's Orissa, ii. 72.) A similar usage still exists among the Tamil inhabitants of Jaffna, where all acquisitions made by the sons while unmarried, except mere presents given to them, fall into the common stock. (Thesawaleme, iv. 5.)

These extreme rights of the father were trenched upon by the growth of conflicting rights, viz. those of separate property and partition. A married woman was allowed to have exclusive control over presents given to her for her separate use, by her own near relations and by her husband, especially at the time of her marriage. (Manu, ix. § 194.) But it was still laid down that 'the wealth which is earned by mechanical arts, or which is received through affection from any other but the kindred, is always subject to the husband's control.' (Daya Bhaga, iv. 1, §§ 19, 20.) In the Punjab it is recorded by Messrs. Boulnois and Rattigan, the former of whom was lately Chief Judge of the Chief Court, that 'in village communities such a thing as woman's separate property seldom exists.' (Punjab Customary Law, 64.)

The right of a junior male member of the family to make separate acquisitions sprang up very slowly. Originally it was limited to the gains

of science and valour, but even these were little favoured. The slightest use of the family property barred the self-acquisition. Nor is it certain that originally the whole of the separate gains went to their acquirer. (See Mayne, Hindu Law, 3rd ed., p. 208 *et seq.*) Gradually, however, with the extension of commercial and professional earnings the doctrine became of more importance.

The growth of the law of partition was even more gradual. In very early times land with its flocks and herds would be the only form of wealth. A text of Uçanas (Mitakshara, i. 4, § 26), which asserts that land is indivisible among kinsmen even to the thousandth degree, seems to take us back to a time when the nucleus of the family property was impartible. No doubt the right of partition would advance *pari passu* with the right of self-acquisition. It was admittedly favoured by the Brahman jurists on the ground that religious duties were multiplied in separate houses. Yet the earliest Hindu lawyers in the most express terms denied the right of a son to have a partition till after his father's death. This is to the present day the law of Bengal. The author of the Mitakshara, who extended to the utmost the joint rights of the son in the family property, laid it down that a son could enforce a partition of the family property even during his father's life and against his consent. Yet so thoroughly was such a right opposed to popular feeling that it was seldom enforced and constantly denied. Up to a period of about twenty years ago the right was treated as an open and an arguable question by all the High Courts which administered the Mitakshara law, and no later than in April of this year the point was solemnly and finally disposed of by the High Court of Bombay. (See Mayne, Hindu Law, 3rd ed., pp. 210–215, 442; Law Quarterly Review, p. 390.)

As respects the whole of this part of their argument, Messrs. McLennan have fallen into the mistake of treating Hindu law as if it had no history, and as if the paternal authority of the primeval parent was restricted by all the limitations which have grown around it during the lapse of some two thousand years. They have fallen into the further error of ignoring some of the most remarkable instances of that authority which survive to the present day.

One of these instances arose out of the religious obligation of a son or grandson to pay the debts of his male ancestor, even though they were purely personal to the debtor, and in no way beneficial to himself, provided they were not immoral in their origin. The obligation attached even though the descendant had received no assets from the ancestor, and, where the debtor was his father, he was bound to pay not only principal but interest. From this obligation has been deduced the further consequence, that a father or grandfather could sell or mortgage the whole joint property of himself and his descendants, in order to pay off his own personal debts, because this is merely doing by anticipation in his lifetime what the law would compel his offspring to do after his death. (See Mayne, Hindu Law, 3rd ed., pp. 272–275, 278–283.) The result is, that the very same man who, in his capacity of manager of the family property, has no power to bind any of the joint owners against their will for purposes not beneficial to themselves, and cannot even dispose of his own share for his own benefit, may, in his capacity of male ascendant, dispose not only of his own share, but of the shares of his descendants, for debts which did not even profess to be contracted with their assent or for their benefit. Surely this is a crucial instance of Paternal Supremacy.

Another remarkable instance of the same power is the right of the father to give away—in ancient times even to sell—his son in adoption. A

millionaire may in this way hand over his infant son to a pauper, and cut him off for ever from all right in his own natural family. The act is irrevocable and without appeal, and however flagrantly injurious it may be to the infant's prospects, there is absolutely no process by which it can be prevented. This power is solely vested in the father, and, after his death, actual or civil, in the mother as the surviving representative of the father's authority. (See Mayne, Hindu Law, 3rd ed., p. 120.) Short of the power of life or death, it is difficult to imagine what stronger proof of parental authority could be furnished than this.

Let us now see what support the Hindu law of inheritance can furnish to Mr. McLennan's theory of kinship through females.

In the first place, then, it must be remembered that the whole ceremonial religion of the Hindus, as of the Greeks and Romans, rested upon the worship of their male ancestors. These extended to fourteen generations. (Rajkumar Sarvadhikari, Law of Inheritance, i. 54–57.) It was assumed therefore that a man could identify not only his father, but his male ancestors in unbroken line extending over about 400 years. No mention whatever is made of female ancestors in the texts of Manu which prescribe these ceremonies. As to the law of succession, the rule of early Hindu Law, which still prevails everywhere except in Bengal and Bombay, is that no cognates, or males deriving through a female, are admitted to the inheritance until every male claiming by unbroken male descent up to fourteen generations from a common male ancestor has been exhausted. Baudhayana and Vasishta, writers far earlier than Manu, mention no females in their list of heirs, and the former expressly states, on the authority of a text of the Vedas, that women have no right to inherit. (Baudhayana, ii. 2, 3, § 46.) His authority is still so far respected that the schools of Bengal and Benares consider that women can only inherit under some express text. (See per Curiam, L. R., 7 I. A. 231.) The exceptions allowed by these texts to the exclusive right of males claiming through a male are the widow, daughter, daughter's son, and the mother and other female ascendants. A sister is nowhere mentioned.

Now, of these excepted cases, the widow and female ascendants are strictly agnates; upon marriage they lose the *gotra* or family of their origin, and pass into the family of their husband. The daughter comes under the same rule till her marriage; but she, in common with the other female heirs, only takes an estate for life; and after her death the inheritance returns to the heirs of her father. The daughter's son, however, is from the first a member of a different family, and takes absolutely, and as a new stock of descent. The question arises, how this undoubted exception to the general rule was admitted? The explanation seems to be found in a very obscure branch of the Hindu law, which enabled a sonless father to appropriate to himself the first son of his daughter, who was then called an appointed daughter. Manu says, 'By that male child whom a daughter thus appointed, either by an implied intention or a plain declaration, shall produce from an husband of an equal class, the maternal grandfather becomes in law the father of a son: let that son give the funeral cake and possess the inheritance.' (Manu ix. § 136.) Originally, then, the daughter's son inherited, because by the act of the grandfather he was taken out of his own family, and affiliated to the family of his maternal grandfather. Afterwards the practice of appointing a daughter became obsolete, but the rights of a daughter's son were preserved, partly on account of his near consanguinity, and partly because in his own capacity he was entitled to make offerings to his maternal grandfather. What confirms this view is,

that in the order of succession he does not take as a cognate, which he actually was, but among the Gentiles, to whom strictly he could not belong. A still more important confirmation is derived from an application of the maxim, 'Cessante causâ cessat et ipse effectus.' In the Punjab the reasonings and theories of the Brahmanical lawyers never took any root. Now there we find the universal rule to be that neither a daughter nor a daughter's son ever inherit. Sometimes a daughter takes till her marriage, that is, while she is in the family. Her son never takes, because he is out of it. 'The general idea is that the daughter has a right to be suitably married—nothing more. Among Hindu tribes, and among some Mussulman tribes, the daughter must marry into another *gôt*, to which thereafter she and her children belong; and as one of the strongest feelings is that property must not leave the *gôt*, she and her children have no right to inherit her father's property.' (C. L. Tupper, Punjab Customary Law, ii. 145. See also p. 79. Boulnois and Rattigan, pp. 16–37.)

So far it would seem that there is nothing in the Hindu law of inheritance which favours the theory of kinship through females, as necessarily arising from the absence of a recognised male ancestor. But Mr. Donald McLennan has two elaborate chapters (xvi and xvii) on Sonship among the Hindus, from which he arrives at the conclusion that kinship among the Hindus was, after all, founded on maternity.

According to the very early Hindu law, a man might have numerous different sorts of sons, who came under the following heads:—(1) Those of whom he was the actual father, by a lawful wife or a permanent mistress; (2) Those whom he adopted; (3) The son of his appointed daughter; (4) The son of his unmarried daughter, born while she was still a member of his family; (5) The son with which a man's bride is pregnant at the time of her marriage; (6) The sons begotten upon a man's own wife or widow, by a person who was specially authorised to raise up issue to him; (7) The sons begotten upon another man's wife by a person to whom the husband had sold the right of intercourse with her. As regards all these the present writer said, in a work published in 1878 (Mayne, Hindu Law, 3rd ed., p. 59): 'A man's son need not have been begotten by his father, nor need he have been produced by his father's wife. How is such a state of the family, which seems to set genealogy at defiance, reconcilable with a system of property which is based upon the strictest ascertainment of pedigree? I believe the answer is simply this—that a son was always assigned in law to the male who was the legal owner of the mother. Further, that the filial relation was itself capable of being assigned over by the person to whom the son was subject, or by the son himself, if emancipated.' The latter proposition, which relates to adoption, is immaterial to the present enquiry. The former is substantially adopted by Mr. McLennan. He says (p. 313): 'Sonship was not founded upon paternity. It was founded upon maternity, and through the mother a child belonged to the man who possessed rights over the mother.' Again, at p. 315: 'Marriage was commonly among early Hindus an affair of sale and purchase, and the peculiarities of Hindu family law sprung out of an early system of contracts for marriage made on that footing.' 'It is easy to see that the facts are exactly what we might expect to find were such a system of contract superinduced upon the system of counting kinship through females only. This system of kinship makes children of their mother's stock, and affiliates them to their mother's family—whatever be the connection of which they are the offspring. What would happen then if there were superinduced upon it a system of contract in virtue of which a woman with her issue was transferred from her family

to a husband, and she was taken into the husband's stock? The children, being of the stock of their mother, would now be of the stock of her husband, so that they could be his children; and, being his in virtue of the contract, they would be his children. And as his daughter would be his, so would her issue, except so far as he had transferred it by contract to another man. Her child born before marriage would be his. If when she was married, he bargained to have a child of the marriage, that would come back to him; when he gave her over to a husband without reservation, her children would be the husband's, and all her children would be his—if he chose to have them—whether they were his own offspring or not. Contract following upon kinship through females only would therefore yield in the first instance precisely the system of parental right and sonship which we have found among the Hindus.'

Now the first objection to this argument is that it begs the whole question. Assuming a system of kinship through females, that might have been transformed into a system of kinship through males by contractual marriages. But where is the proof that the Hindus as a race—still less that the original Aryan stock—ever had a family system based upon female kinship? The evidence is all the other way. What is the use of supplying a tortoise to support the world, when the tortoise itself has nothing to stand on? Again, how will the theory fit in with cases where there never has been a marriage, such as the offspring of a concubine or a slave? How were they transferred from their mother's family? How does it fit in with the marriages where there was no contract? At the time when these various sorts of sons existed, there were eight forms of marriage, only one of which involved sale and purchase, and it is condemned by Manu (iii. 41) as one of the base marriages which produce false, cruel, and irreligious sons. Three of the forms are inconsistent with any consent of the parents. Marriage by capture, which was Mr. J. F. McLennan's special discovery, is founded on force and not upon contract. The theory seems to have the fatal defect of not meeting all the cases which it is intended to explain.

Apart from admitted cases of polyandry among the hill tribes of India, and cases of mere moral laxity, Mr. McLennan's only positive argument as to the former existence of his assumed family system appears to be derived from the early law which permitted the marriage of a widow with her brother-in-law, and the Levirate. The argument appears to be that both are so repulsive, that they can only be accounted for by assuming that habits of polyandry, in which one woman was the wife of several brothers, had made such connections familiar and natural to those who practised them. One is tempted to enquire, if these practices can only be accounted for by the grosser form of polyandry, how can polyandry be accounted for? If society could adopt the more repulsive mode of life, it could equally have originated the less repulsive form, as children say, out of its own head. But it seems to us that the argument will not bear examination. First, as to marriage with a deceased husband's brother. Is there anything naturally repulsive in this? It is simply the converse of marriage with a deceased wife's sister, for the encouragement of which an influential society exists among ourselves. Does Mr. McLennan think it necessary to account for such marriages by supposing that Englishmen were once polygamous, and formed a taste for their sisters-in-law by marrying a whole family at once? In the case of the Hindus the reasons for marrying their brothers' widows were so strong that it is strange the habit did not become universal, instead of becoming obsolete. Brothers and their wives all lived together in the same house. On the death of one brother the survivor would have to

maintain and manage his brother's widow as well as his property. An old text says, 'In all the four classes wives and goods go together. He who takes a man's wives takes his property also. The wife is considered the dead man's property.' (Narada, iii. §§ 23, 24.) Apparently the wife passed by descent as a chattel.

The Levirate is a matter of a little more difficulty. The admitted facts are as follows. (Mayne, Hindu Law, 3rd ed. pp. 61–65.) In early times it was the practice for a Hindu, who failed to beget sons, to authorise another man to beget a son upon his wife. He might employ any one he liked for this purpose, and in several of the best known cases the person employed was not of the same family, nor even of the same caste, as the husband. Another practice, which Mr. McLennan calls the Levirate, was that in the case of a man who had died sonless, his widow was allowed to have a son procreated upon her. This permission, however, was accompanied by restrictions which did not exist in the former case. Some family authorisation was necessary, and the procreator must be a brother of the deceased, or a very near relation. Now as to this, the present writer suggested that the latter practice was merely an extension of the former. But there was this difference between the two cases, that in the latter, for the first time, the element of fiction was introduced. In the former case, the husband became the father, not by any fiction of paternity, but by the simple fact that he was the owner of the mother. But after his death the ownership had ceased, unless, indeed, by another fiction, he was considered as still surviving in her. (The husband is even one person with his wife. Manu, ix. 45. Of him whose wife is not deceased half the body survives. Vrihaspati, 3 Dig. 458.) Therefore, unless the husband had given express directions during his lifetime, the process to be adopted was to be as like as possible to an actual begetting by him, or was to be such a substituted begetting as he would probably have sanctioned.

To this Mr. McLennan objects in the first place (p. 270) that the fact which created paternity in the former instance (viz. continued ownership of the wife) was wanting in the second. But that is the case with all legal fictions. The essence of them is an assumption that something exists which does not exist. An exact analogy is furnished by the Hindu law of adoption. A man who adopts pretends that he has begotten a son: here he might have done what he pretends to have done. He dies leaving his widow an authority to adopt, upon which she acts: here he could not have done what he pretends to have done. The fiction is more fictitious. But suppose he has left no authority to adopt, the law of part of India allows an authority to be supplied by the relations or by the widow herself. Here the fiction is trebled. They pretend that he has pretended to do something which he could not have done. Then Mr. McLennan (p. 271) falls into the mistake of supposing that in the Niyoga (during the husband's life) there was the same necessity as in the Levirate that the physical father should be the brother or near relation of the putative father, and asks what originated the Niyoga itself, and why did the same limitation exist in both instances? The answers he supplies are that both are survivals of Tibetan polyandry. The real answer is that there was no such limitation in the Niyoga, and that the origin of it was simply that a sonless man was supposed to go to Hell, and that there was nothing in early Hindu law or morals to prevent a husband saving himself from Hell by submitting his wife to the more fruitful embraces of another man. If he died without so saving himself, his relations tried to save him by carrying out the same process posthumously in the most delicate way they could invent.

Lastly, Mr. McLennan suggests (p. 272) that the explanation does not account for the Levirate in the Hebrew or other systems. Perhaps not; but wherever the Levirate does exist two conditions will probably be found. One, some very strong motive inducing a father to leave a son behind him; the second, something in law or social usage which renders it unnecessary that that son should spring from his own loins. Couple these conditions with a considerable lack of female delicacy, and the Levirate will not be more insoluble than any other legal problem.

We do not of course profess to have dealt with every part of Mr. McLennan's argument. The space at our disposal forbids us to do so. We have refrained from entering upon legal regions where every step is at present based upon conjecture. The strength of the case against the authors of 'The Patriarchal Theory' rests upon Hindu law. The bulk of their treatise is devoted to meeting that case. In our opinion they have not met it, and the views put forward by Sir H. S. Maine remain unshaken by the work under review. If anything, they occupy a stronger position, from having repelled assailants of such ingenuity and vigour as the brothers McLennan.

JOHN D. MAYNE.

A Treatise on the Law of Collisions at Sea. By REGINALD G. MARSDEN. Second Edition. London: Stevens & Sons. 1885. 8vo. xlviii and 560 pp.

MR. MARSDEN'S second edition is just what the second edition of a legal text-book should be. It represents the more mature thoughts of the writer, more carefully expressed, more thoroughly elaborated, more furnished with instance and example than the first and perhaps somewhat crude work.

Mr. Marsden is a lawyer, but he is also a seaman; and herein lies great part of the value of his book. He looks at the decisions which form now an elaborate commentary on the Rule of the Road at Sea quite as much from the point of view of the man who has to steer his ship by them and keep her from collision as from that of the lawyer who in his study has to apply these rules as tests of theoretical responsibility for collisions already incurred.

It would perhaps have been better had Mr. Marsden confined himself a little more closely to the lawyer-sailor point of view. There are symptoms of a tendency to convert his work into a treatise on Admiralty procedure, which would spoil it as a manual for seamen: and it is not so clear that Mr. Marsden possesses the necessary gifts for such a treatise. As it is, the passages in pages 36 to 40 seem out of place and jejune, and do not show a complete grasp of the subject; while at p. 81 decisions as to the procedure for enforcing a master's claim for wages against a company in liquidation are cited as decisions upon the priority of liens for damage by collisio.

The main part of his work however is the handling of the Rule of the Road; and here Mr. Marsden is of use not only to English sailors and lawyers, but to those of all nations. It is curious how all Codes become encrusted with commentaries, and how the unavailing struggle to escape the commentator leads only to an amended code of inordinate length. Mr. Marsden points out in his preface (p. vi) how serious an evil the complexity of the present rule has become; and when one thinks that in 1840, even after the introduction of steam-ships, one rule in five clauses sufficed for all purposes, and contrasts this with the twenty Articles of 1862, and this again with the twenty-six Articles full of sub-clauses and provisoes of 1884, one sees how well-founded is the writer's caution.

On another point, the origin and application of the rule as to the division of damages, Mr. Marsden's treatise is of interest for the jurist. Still more interesting will be the collection of ancient Admiralty 'sentences' which he proposes to publish separately.

After the researches of Dr. Raikes and Mr. Marsden it certainly seems that the Admiralty rules as to division of damages are not so ancient or so general as they have been supposed to be. But the last word will not have been said on this subject until the origin of the difference between the English and the American rule has been traced. The American rule has a wider application than the English, as it divides the damage where the fault is inscrutable, that is, where it is clear that there has been negligence, but it is not possible to ascertain which was the negligent party. Mr. Marsden has lost hold of this point, by reason of an unfortunate misunderstanding of the American case of 'The Clara' in 12 Otto's Reports. He cites it (p. 132, note k), as a decision that where the fault is inscrutable neither can recover. But in fact the Court decided that there was fault, and that it lay with the plaintiffs' ship alone, and therefore the plaintiff could not recover.

The book before us is so good that the few corrections which we now propose to make are inserted here only with the view of rendering it as complete a work of its kind as possible.

At p. 79 the definition of a 'ship' requires recasting since the decision of the English Court of Appeal in 'The Mac'—a case which is referred to somewhat out of its place at p. 175.

At p. 101 the case of 'The Limerick' is given as an authority; but the case so far as it was an authority on this point was reversed on appeal. L. R., 1 P. D. 411. At p. 109 the case of 'The Maid of Kent' is inaccurately stated.

The law as to tug and tow has perhaps not yet reached its final settlement, and it certainly does not commend itself to Mr. Marsden; but it is not so irrational as he represents it to be at pp. 190, 191. The tow has been held responsible for the fault of the tug because the latter has been treated as the tow's servant; but the tug has not been held responsible for the tow.

The comments at p. 218 on the application to foreign ships of the English statute making desertion *primâ facie* evidence of previous negligence would not have been made if the writer had more clearly grasped that the legislature is giving directions to its own Courts how they are to proceed, and that *lex fori* is as binding upon foreigners as upon natives.

Pilotage law is the most unintelligible and disagreeable subject with which a practitioner in the English Admiralty Court has to deal. There is, as Dr. Lushington once said, no reason to be discovered why some ships should be compelled to take pilots in English waters and others not. But Mr. Marsden has upon the whole mastered the ins and outs of the various cases. He has however misunderstood the case of 'The Hankow,' and has consequently fallen foul of it three times (pp. 234, 258, 269). If he had noticed that 'The Hankow' was carrying passengers and was therefore bound under the Merchant Shipping Act, 1854, to take a pilot, unless she could show exemption under earlier statutes, he would not have been troubled by the decision.

At p. 276 it is said that the shipowner has the liabilities of a common carrier; and the case of *Nugent* v. *Smith* (L. R., 1 C. P. D. 423), which does not so decide, but rather implies the contrary, is cited.

At p. 280 it is not perceived that the defendants in *Doolan* v. *Midland Railway Co.* (L. R., 2 App. Ca. 792) came under the Railway and Canal

Traffic Act, and could not make the contract which they sought to set up.

At p. 374 the rule as to steam-ships meeting 'end on' is not explained with the writer's usual clearness; and cases decided before the rule took its present shape of exact definition are quoted as if they were authorities upon its present construction, whereas in truth the words of definition were added to show that the rule did not apply to these cases.

It is believed that the above is a pretty exhaustive list of imperfections; subject to these few defects, the treatise is one (as it appears to the present writer) of the greatest value.

W. G. F. P.

A Treatise on Communication by Telegraph. By MORRIS GRAY, of the Boston Bar. Boston, Mass.: Little, Brown & Co. 1885. 8vo. xvi and 278 pp.

THIS is one of the works on special subjects of commercial law which, so to speak, cut across a number of interesting questions of principle. Mr. Gray has gone to work in a clear-headed and business-like fashion, and it will be no fault of his if the lawyer engaged in a telegraph case (meaning thereby not only a case in which a telegraph company is directly concerned, but any case in which the legal conditions or effect of communication by telegraph are in question) fails to ascertain from his book what line of argument is reasonably likely to serve his purpose, by what authorities it can be supported, and what are the difficulties he may expect to contend with.

In America the Post Office has not undertaken telegraphic business; it is in the hands of private corporations, which however are deemed to exercise a public calling the profession of which binds them to serve all customers properly demanding their service. In England questions of the same kind may still arise, and have arisen, with regard to companies doing foreign telegraph business, for whom the Post Office receives messages only as an agent. As to the American authorities, attempts have been made to hold the companies liable as common carriers; but the better opinion is that their position is like that of railway companies as carriers of passengers; in other words, they are not liable for pure misadventure but only for negligence, or more exactly, their contract is to use all reasonable diligence. Mr. Gray cites from Alabama an odd case of delivery to an impostor. *Z* telegraphed to *A*'s uncle in *A*'s name, asking for a telegraphic money order. The confiding uncle telegraphed an order addressed to *A* at the place (not *A*'s habitual dwelling-place) whence *Z* had telegraphed. *Z* got the message and the money. The uncle on discovering the imposture sued the telegraph company. The Court 'regarded the delivery to the impostor as a misdelivery, but an excusable one.' Mr. Gray thinks the company had performed its contract by delivering the message to the person to whom the sender intended it to be delivered, him, namely, who had telegraphed in the name of *A*. This appears to us to be the right view. Suppose *A*'s uncle had seen through the trick, and had sent the order asked for on purpose to lay a trap for *Z*, and that the company's people, having also discovered the truth, but not knowing that the sender knew it, had taken on themselves not to deliver the message, or had delayed forwarding or delivery in order to communicate with the sender; this, however well meant, might surely have been treated by the sender as a breach of contract.

Points of a kind familiar in this country in relation to the contracts of

railway companies and shipowners are raised by the special conditions commonly printed on the blank message forms of the American companies. Mr. Gray sets out the common forms of one of the great corporations, and considers them in some detail. It seems that telegraph companies there, like railway companies here, sometimes overreach themselves by making the special conditions so large as to stultify the essence of their contract, in which case they are void. But where the conditions, if assented to, are valid, it is generally held that one who without dissent writes his message on a paper fairly exhibiting those conditions cannot afterwards be heard to say that he did not assent to them. The weight of English authority *in pari materia* is to the same effect.

There is a marked difference between English and American jurisprudence as to the rights of the receiver of a message. According to our authorities he cannot sue for loss sustained by reason of any telegraphic error: not on the contract, for he is no party to it; not for deceit, for the indispensable element of bad faith is wanting; not for negligence, because the negligence, if it exists, is wholly in and about the performance of a contract, and to let a stranger sue for that negligence would be as much as to let him sue on the contract itself. In the United States the contrary opinion is received; Mr. Gray approves the result on grounds of public policy, but thinks the reasoning of our Courts difficult to escape. It may be worth considering whether the foundations of that reasoning have not been shaken by the Court of Appeal itself in the recent cases of *Heaven* v. *Pender* and *Foulkes* v. *Metropolitan District Railway Company*. Those cases give to 'the broad principle that a person must so conduct his business as not to injure others' a much wider application than English lawyers would have admitted a generation ago.

Mr. Gray is not quite so full on the topic of contracts concluded (or not concluded) by telegraph. In particular, he does not discuss the point, unsettled in England and for aught we know in America, whether the revocation of an acceptance, despatched by telegraph after the acceptance has been despatched by post, and in fact arriving before it, is or is not effectual.

The style of this book deserves hearty commendation. Mr. Gray might easily, without exposing himself to the charge of book-making, have produced a cumbrous volume loaded with extracts from reported judgments and abounding in unresolved contradictions. He has chosen the more difficult and worthier part, and the volume he has given us is systematic, concise, and readable. 'Book-making' means, paradoxically enough, putting together a thing that looks like a book and is not a book. This is a real book.

F. P.

The European Concert in the Eastern Question. A Collection of Treaties and other Public Acts. Edited, with Introductions and Notes, by Thomas Erskine Holland, D.C.L., &c. Oxford: Clarendon Press. 1885. 8vo. 358 pp.

This is a very valuable work. Within the compass of a volume of convenient dimensions Professor Holland has contrived to place before his readers a complete documentary history of all the diplomatic transactions relating to the process of disintegration to which the Ottoman Empire has been subjected in the course of the last sixty years. Those who in search of the Acts concerning it have toiled through dispersed and fragmentary blue books, the bulky tomes of the 'British and Foreign State Papers,' and

the labyrinth of treaty collections fearfully and wonderfully constructed by G. F. de Martens and his continuators, can appreciate Dr. Holland's useful labour, which has enabled the ordinary reader not living in a great library to carry in his hand the authentic records of the Eastern Question. Without more trouble than that of turning over 358 pages he can now, thanks to the learned compiler, follow the course of interventions deprecated and effected, of revolutions deplored and sanctioned, of promises frequently renewed and never performed, of guarantees solemnly given and seldom fulfilled, of encroachments upon assured independence, and of the dismemberment of territories, the maintenance of the integrity of which has been, as all the world knows, an object of special solicitude to the Powers of Europe.

The plan of the work seems a judicious one, although some persons may perhaps regret that the stumbling-block of an Appendix could not have been avoided. The matter is methodically arranged in divisions, each of which contains a succinct historical view of the dealings of the Porte and the Great Powers in the settlement of one of the branches of the Eastern Question, followed by the Texts of the Treaties, Protocols, and other Acts belonging to the subject, together with copious notes necessary for their elucidation.

After a general introduction, we come to the affairs of Greece from 1826 to 1881, which are treated in Chapter II; the Protocol of 1826, the tripartite treaty of 1827, the decennarian conference of London, the creation of the new kingdom, the Protocols and Conventions establishing the Bavarian dynasty on the throne, and those which thirty years later disestablished it in favour of a new dynasty, the generous but unwise abandonment of the British Protectorate of the Ionian Islands, the Berlin Protocol, and the mediation imposing upon the Sultan, with doubtful justice, the territorial cession finally concluded by the Convention of May 24, 1881. The eighteen pages of Chapter III are sufficient for Samos and Crete, the troubles and the administration of which classical islands have ceased to excite a very lively interest among Britons. More attention will be paid to Chapter IV, in 116 pages, on Egypt from 1839 to 1885, from Mehemet Ali to Tewfik, from the political complications which were cut through by the Convention of London of July 15, 1840, to the financial embarrassments which have not yet (July) been removed by the Convention of London of March 18, 1885. Here Dr. Holland renders great assistance to any one who may endeavour to comprehend the respective rights, or pretensions, and the relative positions of the Sovereign Sultan who is not allowed to exercise sovereign power, of a quasi-independent ruler who depends for his existence upon foreign support and who cannot rule, of the foreign Powers great and small, of the International Courts, and of the bondholders. The whole series of Acts bearing upon these matters is set out, both those documents which have present force, and those which have only historical importance. It seems worthy of consideration, however, whether in any subsequent edition their arrangement might not be improved by placing under the head of 'Texts' the Convention of July 15, 1840, which now appears in the introductory portion of the chapter.

Next in order, the disturbances of the Lebanon, and the regulations adopted for its administration, occupy the fifth chapter. The nature of the contents of the sixth and concluding chapter, headed 'The Balkan Peninsula,' &c., is indicated by the words of the opening paragraph: 'In the preceding chapters we have traced the gradual emancipation, under the supervision of Europe, of isolated outlying portions of the Ottoman

Empire. We now approach a larger subject. During the last thirty years the Powers have assumed to deal with the central mass of the Empire; pruning it of its appendant tributary provinces, and recognising them under various conditions as independent states; readjusting its frontiers; regulating its waterways; and even supervising the details of its local administration.' All these topics are embraced in a comparative review of the settlements effected by the Treaty of Paris of 1856 with its subsequent modifications, and the Treaty of Berlin of 1878 with its supplementary arrangements. The Firmans of 1839 and 1856 on religious and political equality in Turkey, the Treaty of San Stefano, the Definitive Treaty of Peace between Russia and the Porte of 1879, the Cyprus Convention, and the Convention of 1879 concerning the Austrian occupation of Bosnia and Herzegovina, are given in the Appendix. Some not immaterial dates are unfortunately misprinted. EDWARD HERRIES.

Recherches sur quelques problèmes d'histoire. Par FUSTEL DE COULANGES. Paris: Hachette et Cie. 1885. 8vo. iv and 530 pp.

In an unpublished MS. of the English Chronicle, with a sight of which we have been favoured, the following passage occurs towards the end of the ninth century:—'On this year king Alfred sent clerks to Oxenaford to deem dooms of young men, as well earls' sons as churls', that would fain be judged of law-right worthy. And there they then offslew some six that spake idle speech of the Witan. And eke they did under the plough pass every one that made mention of the Mark System. And after that the land had good peace for a year.' Seriously, the Mark System has become a nuisance in our law schools; not by any fault of Von Maurer or Kemble, or the Bishop of Chester, or Mr. Freeman, but because researches intended for the use of scholars have been dragged into the routine of dogmatic instruction and examination. Those for whom Von Maurer wrote, and those for whom in the first instance our own scholars have written, can distinguish for themselves between facts proved by direct evidence, and hypothetical reconstruction of things whereof direct evidence is wanting. But the premature vulgarizing of historical theories effaces these distinctions; and we are producing in England—perhaps there is also being produced in Germany—a generation of secondhand retailers of learning who persuade themselves that as much is known of an archaic Teutonic land-community regulated by something called the 'mark system,' and with the same sort of warrant, as of the constitution of an English manor in the fourteenth century. This is a misfortune for learners, and unjust to the masters whose opinions are exaggerated and travestied. Certainly it is time for the superstition to be effectually checked. Mr. Seebohm's ingenious and popular book might, with more deliberation and caution, have answered this purpose. But Mr. Seebohm has himself fallen into the errors of underrating the complexity of the subject and grasping hastily at large conclusions. His execution is unequal, sometimes crude; and he stands committed to gratuitous and extremely doubtful conjectures, which do not affect the value of his definite contributions to our understanding of English rural economy in the Middle Ages, but do give his work in its present form a character of temerity and paradox, and prevent it from taking rank with the classical productions of historical research. As for the lucubrations of Mr. Denman Ross (of Cambridge, Mass.; not of Harvard University or its law school), who thinks that *camporum spatia* can mean inclosures, and that *via* and *aquae cursus* in legal documents import the ownership of the soil

of the road and the bed of the stream respectively, we should not mention them at all but for the fact that M. Fustel de Coulanges has thought fit to refer to Mr. Denman Ross in terms of something like approval. Now M. Fustel de Coulanges' own work in this volume of studies is that which hitherto we lacked—a serious and scholarly criticism on the current Teutonic theory, as for shortness' sake it may be called, of the village community. We hope in time to take the matter up more fully. Meanwhile we briefly note the chief points.

M. Fustel de Coulanges states the problem: 'Les Germains connaissaient-ils la propriété des terres?' This broad form of question is rather misleading, as the Teutonic school from Kemble and Von Maurer to Mr. York Powell have always affirmed that the free man's homestead was private property as far back as even conjecture reaches. However, M. de Laveleye says that the Germans as first known by the Romans were 'un peuple de pasteurs qui avait conservé les mœurs guerrières des chasseurs primitifs:' and M. Fustel de Coulanges does not therefore perform a superfluous task in proving that this is not what the Romans tell us. Cattle was the wealth of the Germans, but they were no more 'un peuple de pasteurs' than the Homeric Greeks. Tacitus does not commend their pastoral simplicity in not farming at all, but (writing for Italian farmers who had brought their business to great perfection) reproves their barbarousness in farming badly. In the much discussed passage of the Germania, c. 26, 'Agri pro numero cultorum,' &c., Tacitus meant to describe a system of farming; any light he throws on the nature of German land-holding is merely incidental. Otherwise he would have used a different set of terms. In M. Fustel de Coulanges' view, Cæsar does explicitly deny the existence of private property in land among the German tribes he knew, and his account cannot be harmonized with that of Tacitus. But how do we know that the customs of all German tribes—especially frontier tribes—were alike? It is reasonable to suppose that both Cæsar and Tacitus spoke truly according to their information. All this is most legitimate and useful criticism.

Again, M. Fustel de Coulanges points out that in archaic Germany we find not only slavery, but marked inequalities of rank among free men, and lords of land whose domains are tilled by their slaves. Any one who maintains the contrary—who states or assumes, for example, that the Teutonic village community was a pure democracy—must throw aside the clear witness of Tacitus. M. Fustel de Coulanges will hardly find any desire among English scholars at any rate to do so. Are not these things written for us in Kemble? and has not Sir Henry Maine carefully warned us that the archaic type of a village community is not democratic at all, but a close and jealous oligarchy?

Lastly, it is argued, and in our opinion proved, unless material documents have been overlooked, that there is no early authority for the use of the word 'mark' as a compendious synonym of 'village community,' as is done by Germans when they speak of *Markenverfassung*, *Markgenossen*, and the like, and in the imitative English term 'mark system.' The present writer had already formed the same conclusion as regards England. There is no more evidence that 'mearc' ever could mean a township than that an English form of 'alod' existed. Nothing of the kind is discoverable in our authorities. It is proper and necessary that this point should be clearly brought out. But the words 'mark,' 'village community,' 'communauté agraire,' are only signs. To correct the misuse of one or another sign is not to dispose of the thing signified. We find that private ownership of land is very ancient in the Teutonic nations (and note, reader, that,

whatever popularizers and lecturers may have taught in their names, Von Maurer and Kemble were quite well aware of this): we also find, as documents increase in number and detail, a mass of custom seeming to be derived from a still greater antiquity. People in the eleventh or twelfth century knew just as little of the actual origin of these customs as we do; as regards any means of comparative study, they knew much less. If at that time they already regarded rights of common and the like as being always (what in some cases they undoubtedly were) *iura in re aliena* exercised over the land of a lord having the *dominium* of the soil, that would go far to suggest, if we did not know it already, that they had come under the influence of Roman legal ideas. But for the remoter historical inquiry it is simply indifferent. Which is older, the common-field system or the lord? By the common-field system we do not mean a hypothetical constitution of a hypothetical community, but a form of agriculture which visibly existed in fact within living memory. That is the real point to be worked out. Much of the evidence is obscure or fragmentary; much is ambiguous. It would be foolish to affirm that Von Maurer or any one else has said the last word. Only we do not hold it proved, or likely to be proved, that the work of the Teutonic school is all in a wrong direction. Advocates of a primitive *dominium* have some isolated but stubborn points to get over, besides the general suspicion of the idea being developed under Roman influence. We will just mention one or two of these points: the Salic law *de migrantibus:* the edict of Chilperic as to the rights of *vicini:* and the curious rule of English law, known to be as old as Domesday, that a manor cannot exist without free tenants.

Recent studies, the work before us among others, tend in our opinion to show that the English evidences are of even greater importance for the general problems of Germanic institutions than has been hitherto supposed

Another important essay, 'Organisation judiciare chez les Francs,' must be reserved for discussion on some future occasion. Meanwhile it seems to us that, if M. Fustel de Coulanges has offered probable corrections of more than one strained or fanciful inference from the Salic or other texts, there is such a thing as anti-Teutonic no less than Teutonic *parti pris*, and the learned author has allowed himself to be misled by it into captious narrowness. In the face of the hundred existing in England at this day, it is really too much to say that *centeni* in Tacitus means nothing in particular; in the face of the sharp distinction between the king's jurisdiction and that of the county court, still quite alive with us in the sixteenth century, it is really too much to say that such a phrase as 'ante regem aut in mallum' points only to the difference between a court held by the king's officer and a court held before the king himself. F. P.

Lectures on the Law of the Constitution. By A. V. Dicey, B.C.L., Vinerian Professor of English Law. Macmillan & Co. 1885. 8vo. 398 pp.

The new Vinerian Professor at Oxford has published the course of Lectures on the Constitution with which he so amply justified his selection to that office. Mr. Dicey brought to the Chair in the University, not only long experience in the Temple, but his practical authority as the writer of one of the most important legal text-books of our day on the law of Domicil. His present volume he calls an introduction to, not an outline of, English Constitutional Law. Its design is to prepare students of our constitutional

system with a true conception of its dominant principles, and to enable them to look at the constitution from a scientific point of view. The study of the constitution, some practical understanding of which every Englishman obtains from our Parliamentary interests, is not in any strict sense at all an easy subject. Not only does there not exist any scientific commentary on this part of our law, but it is a curious fact that no systematic account of it exists in any language. We have the sonorous, but somewhat obsolete, sketch of Blackstone, wherein neither the name nor the substance of 'constitutional law' is to be found. We have the excellent but unsystematic disquisitions of Hallam; we have the acute analysis of Bagehot from the point of view of the modern politician; and we have exhaustive historical accounts of the origin and development of our institutions by Professor Freeman and an accomplished school of historians. But Blackstone (be it said with reverence) used language which in the mouth of a modern politician would be called the views of 'a man up in a balloon.' Bagehot, suggestive as he is to the daily working of politics, has neither the tone nor the case-learning of a practical lawyer. Our foreign commentators too often speak of our institutions with the bewildering manner of men who to us seem to be using a different set of terms and axioms. And our invaluable school of historians are not professional lawyers, nor much interested in the inner life of our political movement. The consequence is that a serious student of this branch of law is embarrassed and misled. He finds in Blackstone, Burke, Macintosh, and Hallam big propositions which it seems hard to reconcile with the analytic tests of Bagehot and the criticism of foreign publicists, and which sound incomprehensible if he compares them with a speech of Mr. Chamberlain or of Lord Randolph Churchill. He accordingly turns more willingly to the fascinating study of the *Origines*, and what is now called the Embryology, of our institutions. And if you question a young lawyer fresh from the Universities about the working of the State system, you will get a great deal from him about the Jutes and the Village Communities of many races, but almost nothing about the Army Act, or the Appropriation Act; and it will be possible that he never heard of Wolfe Tone's Case or *R.* v. *Pinney*. It is not too much to say that Professor Dicey's new volume for the first time connects and elucidates these different points of view. This admirable course of lectures is really an introduction to the study of the Constitution. For the first time we have it examined from the point of view of the comparative jurist, the historian, the politician, and the practical lawyer. He shows us why there is no systematic account of the English State system, and where lie the singular difficulties that hinder such a work. He shows us why Blackstone's propositions are in a literal sense preposterously untrue, and yet how very rash it would be to recast his words so as to be strictly in accordance with the facts of our day. He shows us the point at which the mere history of the constitution ceases to be instructive and becomes a fresh source of confusion. And he shows us how it comes that profound foreign publicists seem to use a language about the State which is unknown to the English lawyer.

The striking note of Mr. Dicey's teaching is that he is always first and foremost an English lawyer. That central hold on his subject he maintains without flinching. Theories, subtle and just, he gives us; but he never forgets that he is a lawyer training lawyers. This is an absolute condition precedent to those who will learn to understand our English polity. A jurist, a publicist, a politician, a philosopher perhaps, might treat exhaustively the State system of France, Germany, Switzerland, or the

United States. But the English Constitution is in a peculiar sense the province of the English lawyer. It rests on a mass of uncodified precedent, partly pure case-law, partly parliamentary practice: the whole of which is not to be found in any methodical document or set of documents, and the interpenetration and coordination of which can hardly be followed except by a lawyer trained in English courts of justice.

The distinctive feature of Mr. Dicey's method as a jurist is that he keeps continuous hold of the analogies presented by foreign systems. He shows us at every step how fundamentally the English State system differs from every known type of constitution, in its entire absence of anything corresponding to a constitutional code, to 'organic' laws, to 'administrative law,' to official irresponsibility; and in the peculiar character of our sovereignty of Parliament, of the 'control of the purse,' and of what are called elsewhere our 'constitutional guarantees.' This is a work, sorely needed, which has never been done before. The true differentia of the English system has never been adequately seized; and so English and foreign publicists have never used a common juristic phraseology. Foreign observers, deeply as they have studied English institutions, never have perfectly understood them, since they wanted the training of an English lawyer. English lawyers have usually been indifferent to the *causa causans* of foreign systems; and even our historical school, so keenly interested in the democratic constitutions of foreign nations, have studied them more with an eye to the Witenagemót than to the Cabinet, the High Court, and the Privy Council of to-day. Mr. Dicey seems to have been the first to examine our institutions with a combination of the resources which are now opened to us by scientific jurisprudence and history, and the combined training of a practical lawyer and politician. We recommend his original and instructive essay to the public as well as to the student. And we hope he will one day give us that *opus valde desideratum*, a systematic view of the English Constitution. F. H.

Elements of Law considered with reference to principles of General Jurisprudence. By William Markby, D.C.L. Third Edition. Oxford: Clarendon Press. 1885. 8vo. xii and 439 pp.

Dr. Markby's book is a critical and a stimulating one. It boldly calls attention to difficulties in the definition and application of legal conceptions which the text-books of common practice either wholly pass over or meet with unsatisfactory conventional solutions. The experience of nearly fifteen years' use has shown that even in elementary books this intellectual honesty is in the long run the best policy. We may be permitted to regret that in certain places Dr. Markby has not thought fit to go beyond the function of negative or sceptical criticism and undertake the work of positive construction. The value of the critical discipline remains the same. And perhaps it is on the whole a fortunate accident that Dr. Markby, writing as he did in the first instance for Indian students, assumed the position of one looking upon English law from the outside. We could wish, for our own pleasure, that he loved Austin less and the Common Law more: for we think nobly of the Common Law notwithstanding its obvious defects, and in no way approve many of Austin's opinions. Austin did much good in this country by fostering the ideal of a science of law: but he was not a great or even a good lawyer, and it is nothing less than absurd to treat him at this day as a writer of authority. It is hardly fair in 1885 to tell students that lawyers persist in using the phrase 'malice in law,' when in 1882

Lord Blackburn expressly declined to use it: see *Capital and Counties Bank* v. *Henty*, 7 App. Ca. at pp. 771, 772, 787. It is better, however, for law-students to start with a censorious bias than with a servile one.

The Modern Law of Real Property, with an Introduction for the Student and an Appendix of Statutes. By Louis A. Goodeve. Second Edition. London: W. Maxwell & Son. 1885. La. 8vo. xlviii and 661 pp.

The plan of this work is well conceived, and is calculated to place the subject before the student in a new and useful way. The student will find the book both readable and easy, and will gain a pleasant introduction to some of the chief points which the practising conveyancer has to bear in mind. The text bristles with copious extracts from Littleton, Coke, Blackstone, Acts of Parliament, and reported cases. These extracts, to which great prominence is given, are in our opinion both too numerous and too long; they probably fill more than 100 of the 400 pages of text; indeed, that is not all, for the author has set out in an Appendix ten Acts of Parliament and some Rules of Court, thus adding 200 more pages of extracted matter. It seems a little out of proportion in a work on Real Property Law to give three pages to the Probate Act and only four to Copyholds.

We notice some mistakes which ought not to be found in a revised edition of a work recommended to students by the University of Oxford and the Council of Legal Education. For instance, the personal property of an intestate is not distributable among the next-of-kin of the deceased as stated on p. 16, but among the persons entitled under the Statutes of Distribution (*Stewart* v. *Stewart*, 15 Ch. D. 539); sect. 25. (6) of the Judicature Act, 1873, relates only to *legal* choses-in-action and to assignments *not purporting to be by way of charge only*, but the author does not (p. 9) mention either of these limitations; the determination of a lease granted by a tenant for life does not, as is stated at p. 47, give the lessee any right to relief under 14 & 15 Vic. c. 25, which relates only to determination caused by the death or cesser of the estate of a landlord entitled for his life or for any other uncertain interest; and lastly, the Statute of Frauds did not make the attestation by three or four witnesses necessary to the validity of a will (as is stated on p. 92 and not corrected on p. 332), although it did to the validity of devises and bequests of lands or tenements. There should be on p. 41 a reference to 42 & 43 Vic. c. 59. s. 3, which abolishes outlawry in civil proceedings; and the case of *Burgess* v. *Wheate*, 1 Wm. Blackstone, 133, should have been dealt with.

The Duty and Liability of Employers. By Walworth Howland Roberts and George Wallace. Third Edition. London: Reeves & Turner. 1885. La. 8vo. xlviii and 551 pp.

The third edition of this useful book is so greatly enlarged and altered that it is in many respects a new work: a course fully justified by the growing importance of the subject.

Much of the law relating to the liabilities of employer and employed is of very modern origin. Thus no less than 200 pages of this volume are taken up with questions arising more or less directly out of the Employers' Liability Act, 1880.

It may be still not commonly known that the doctrine of 'common employment,' which the Act of 1880 has not destroyed, but honeycombed with exceptions, is a very recent product of case law[1]. The first evidence of any such rule is in *Priestley* v. *Fowler* (3 M. & W. 1), decided as recently as 1837. The following is a judicial statement of the accepted form of the rule: 'A servant when he engages to serve a master undertakes as between himself and his master to run all ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both.' (Per Erle C.J. in *Tunney* v. *Midland Railway Company*, L. R., 1 C. P. p. 296.)

An exception to the rule has been sometimes allowed (oftener in America than in England) where the servant causing the injury has been invested with more extensive authority so as to occupy the position of a vice-principal (Op. cit. p. 186): and this distinction has been lately recognised by the Supreme Court of the United States in the case of an injury to a railway servant caused by the negligence of the conductor of a train (*Chicago, Milwaukee & St. Paul Railway Company* v. *Ross*, 112 U. S. 377).

The Act of 1880 is an experimental and temporary one, but will doubtless be continued or re-enacted, and probably be made somewhat less timid. It is perhaps too much to hope that it may be recast as a clear positive statement of the law. The form in which it now stands, of exceptions to a rule not stated, and these qualified again by minute conditions and sub-exceptions, is most unsatisfactory.

The work before us is readable and full of general interest, and some of the cases referred to are very curious. Thus *Hart* v. *Lancashire & Yorkshire Railway Company* (21 L. T. 261) would seem more likely to have formed the thesis in some exercise in casuistry than the subject of a modern action at law. In this case a pointsman, having but an instant to decide what to do with a runaway engine, turned it into a siding on which there was a train at rest rather than allow it to meet an advancing train. A passenger, injured by the consequent collision, sued for damages; and after some vacillation it was held that there had been no negligence on the part of the Company. But *quaere*, per Bramwell B., whether the pointsman's act, though morally blameless, was not a trespass?

Another important and valuable chapter is that on the effect of death upon rights of action: a branch of law often little understood. The general rule of the Common Law is expressed in the maxim (suspected of being no better than a corrupt following of misunderstood Roman law), 'Actio personalis moritur cum persona.' But the exceptions, statutory and otherwise, are important and not free from difficulty. They are here dealt with in a clear and useful manner. Last, not least, the book is well indexed.

The Law relating to Building, Building Leases, and Building Contracts, with a full collection of Precedents; together with the Statute Law relating to Building, with Notes and the latest Cases. By ALFRED EMDEN. Second Edition. London: Stevens and Haynes. 1885. La. 8vo. lxxiv and 947 pp.

THIS second edition of Mr. Emden's work has attained to considerable size and has reached 900 and odd pages. To a large extent this arises from the introduction of a considerable quantity of fresh subject-matter, such as

[1] Law Quarterly Review, ante, p. 120.

the chapters on Light, Gas and Water, Party-walls, &c. In adding chapters on some of these subjects, such for instance as Party-walls, Mr. Emden has been well advised. His work does not pretend to any scientific or logical arrangement; it is a collection of legal rules and observations on all sorts of subjects connected with buildings, from mortgages of complete houses to extras in building new ones. Hence, the more material can be packed into its pages, the better for the practitioner who wants to find a case or a dictum on this point or that. But still, some of the additions seem hardly wise. Thus the chapter on Gas and Water is too short to be of much practical use. Such a note as this, for example, tells us almost nothing: 'As to taking up pavements, see London and Blackwall Ry. Co. *v.* Limehouse, 26 L. J., Ch. 164. See cases in Michael and Will's Gas and Water (3rd ed. p. 15).' It is scarcely the function of one text-book on a technical subject to refer us to another, and when a case is cited it is advisable to tell us the result of the decision. Again, we regret to find that Mr. Emden has allowed himself to publish a second edition of his work without any material improvement in style. For the sake of his own reputation and of English legal literature every author who reaches a second edition should take pains over his diction. Mr. Emden writes, for example: 'So in building contracts which the builder agrees to complete by an appointed day.' What does he agree to complete? Not the contract, but the work. This, again, is at best a clumsy sentence: 'A consideration of the judgments in this decision will serve to show how perplexing some of the dicta and cases on penalty and liquidated damages are.' One more criticism, and we have done. The cases are piled up in the notes without distinction. There is no advantage in a practice still common, but reprehensible, of citing a number of cases to the same effect, for as long as a statement is adequately supported by a sound decision, nothing more is required: and, on the other hand, if the different cases raise doubts or exhibit distinctions, it is the business of the text-writer to indicate that specifically. Thus to defend the rule, now elementary, that there must be a substantial deprivation of light to give a right of action, no less than seven cases are cited, beginning with one in Carrington and Payne's Nisi Prius Reports, and ending with Ecclesiastical Commissioners *v.* Kino, 14 Ch. D. 213, decided by the Court of Appeal in 1880. Inasmuch as this last case is a sufficient guide to the earlier authorities, it would have been better to cite it alone. Notwithstanding these defects of form, we are bound to express our opinion, based on practical use of the book, that Mr. Emden's work will many times be of service to those who have to do with building cases, and also forms a useful compendium for architects and others who are not lawyers.

A Treatise on Banking Law. Second Edition. By J. Douglas Walker. London: Stevens and Sons. 1885. 8vo. 396 pp.

Although this book has reached a second edition, it is not yet one which can be placed above the common level of text-books. The earlier part consists of a brief summary of the leading provisions of the statutes relating to Banking. The latter part consists of a statement of the law contained in the decided cases with which bankers especially are concerned. The statement, though correct, is not always discriminating. It is said, for instance (p. 40), 'There is nothing of a fiduciary character in the relation of banker and customer with respect to the money paid by the customer to his account; *consequently* a bill in equity would not lie to recover the money so

paid (*Foley* v. *Hill, &c.*):' which is true, but the old practice is now material only as showing that the banker is not a trustee of the money. In speaking of forged signatures and endorsements to a bill (pp. 146, 148) being inoperative, it seems an omission not to have dealt with the apparent exception to the rule in *London & South Western Bank* v. *Wentworth*, 5 Ex. D. 96; where the circumstance that the name of both drawer and indorser were forged was held immaterial in an action by a bonâ fide holder against the acceptor, who had accepted the bill in blank for the purpose of its being negociated.

The chapter on 'Appropriation of Securities,' which is new in the second edition, is perhaps the best in the book. It concludes with a clear statement of the English authorities founded on Lord Eldon's decision in *Ex parte Waring*, and contrasts the English rule with the rule of Scotch law as enunciated by Professor Bell, and maintained by the House of Lords as a Scotch Court of Appeal in the case of *Royal Bank of Scotland* v. *Commercial Bank*, 7 App. Ca. 366.

The Appendix, containing selected sections from the Statutes, is now brought into reasonable bulk; but this, as well as the text, would be more useful if the Index had been fuller, and particularly if the number of primary headings had been considerably increased. For instance, we do not find either 'equitable assignment' or 'assignment,' and have to look for both under 'cheque.' For 'crossing,' likewise, we must hunt under 'cheque,' which occupies three pages of index. 'Negociable' is not indexed, and it would be easy to add numerous instances.

Étude sur Gaius et sur quelques difficultés relatives aux sources du droit romain. Par E. Glasson. Nouvelle Édition, complètement refondue. Paris: Pedone-Lauriel. 1885. 8vo. 329 pp.

M. Glasson writes with erudition not inferior to that of the German masters of Roman law, and with the lucidity natural to an educated writer of French. His work is also distinguished by a good sense and judgment not always to be found in German monographs. The conditions of German academic work are in many ways better than ours, but they tend to foster hypercritical ingenuity and paradoxical invention. M. Glasson will be found to supply a wholesome corrective now and then. He tells clearly and carefully all that is known or reasonably conjectured (not omitting to mention for confutation things unreasonably conjectured) concerning Gaius and his work. Perhaps the book goes rather too much into detail for beginners, but it may safely be recommended to advanced students of Roman law. To give a notion of M. Glasson's thoroughness, we call attention to his chapter *à propos* of Gaius' lost book *ad Edictum provinciale;* this chapter is really an historical and critical essay on the whole subject of the prætorian law, and takes account of e.g. such recent additions to its modern literature as Lenel's reconstruction of the Edictum Perpetuum.

M. Glasson refers to an article in the Edinburgh Review of December, 1828 (not 1823, as printed in his reference), as disputing the attribution of the Institutes of Gaius, as and for which the contents of the anonymous Verona palimpsest have been unanimously received ever since Niebuhr's discovery. The article in question is mainly *de re diplomatica*, the discovery being used in order to illustrate the importance of palimpsests. We are by no means sure that the writer was a lawyer at all; and it seems to us that

M. Glasson has taken a page of mere banter at the expense of German scholarship (the taste of which we are not concerned to defend) for a serious argument. In any case, M. Glasson may be assured that this 'opinion curieuse d'un jurisconsulte anglais,' if such it were, did not produce any effect in this country. We should have been glad to find something more about Mr. Muirhead's workmanlike and scholarly edition of Gaius than the very slight notice which M. Glasson gives to it. And the estimate of the jurists' Latinity is something too rose-coloured. 'Tully, my masters! Ulpian serves his need,' exclaims Mr. Browning's bishop of the Renaissance, and rightly enough from the purely Humanist point of view. English students have a safe guide in Mr. Roby on this matter.

A Concise Treatise on the Law relating to Sales of Land. By AUBREY ST. JOHN CLERKE, of the Middle Temple, Barrister-at-Law, and HUGH M. HUMPHRY, of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons. 1885. La. 8vo. lii and 586 pp.

THIS is a very creditable book. It is well arranged, well indexed, capitally printed, and so thoroughly brought down to date as to contain the cases reported in the Law Reports for May, the very month in which it appeared. The authors seem to possess a peculiar power of combining conciseness with completeness. As a good specimen of the character of their book, we may refer to the way in which they have treated the subject of apportionment of rent (p. 90). They should also have credit for legal acumen in their criticism and disapproval of the decision in *Re Johnson and Tustin*, 28 Ch. D. 84, for that decision has been reversed by the Court of Appeal on the grounds indicated by Messrs. Clerke and Humphry (p. 190) as the true construction of sect. 3. subs. 6 of the Conveyancing Act, 1881.

It may be doubted whether the statement on p. 192, that 'where the abstract shows a good equitable title in the vendor, with power to get in the legal estate, whether under the Trustee Acts or otherwise, it is unnecessary for the abstract to show the devolution of the legal estate,' is not put rather more strongly than the authorities warrant. And we should certainly have expected to find on page 164 a reference to Ord. l. r. 10, as to the conduct of a sale by the Court. The omission must be a slip. But on the whole we may express an opinion that this book will prove a most formidable rival to the best books hitherto published on the same subject.

The Law of Money Securities. By C. CAVANAGH. Second Edition. London: William Clowes & Sons, Limited. 1885. La. 8vo. lxvii and 805 pp.

THE term 'Money Securities' is perhaps somewhat ambiguous, but it is employed by the author in the widest sense; and the title covers a treatise upon borrowing of every kind. Man may almost be defined as a 'borrowing animal,' and it follows that the subject indicates dealings with property of every description. Thus we pass in rapid succession from the law of post-office orders and circular letters of credit to that of mortgages of freeholds, and thence to the customs of the Stock Exchange, so far indeed as the customs of that commercial Alsatia can be said to be the subject of law.

Notwithstanding the wide scope of the work, Mr. Cavanagh finds space to discuss here and there some rather minute points at considerable length. Thus he combats with some warmth and boldness the decision of the Court

of Appeal in *Sutton* v. *Sutton*, L. R., 22 C. D. 511, and finally concludes that the interpretation placed by that Court on 37 & 38 Vict. c. 57. sect. 8 is neither literally, grammatically, or legally correct.

We do not intend any disparagement when we say that the subject of the work is almost too wide, and that the enquirer may therefore be obliged to have recourse to more special works when he has seriously to investigate one of the many complicated questions arising on rights and priorities among borrowers. What the author has given us is a readable and interesting work, and one which will put such an enquirer upon the right track; and the fact that it has reached a second edition shows that it is found useful.

Modern Legislation for Seamen and for Safety at Sea. By E. S. Roscoe, Barrister-at-Law. William Clowes and Sons, London. [1885.]

This is a small pamphlet containing two articles which have appeared in recent numbers of the *Law Times* newspaper. The legislation described begins with the Merchant Shipping Act of 1884, that marvel of swift legislation which, with its 548 sections, passed through Committee in one day. Mr. Roscoe gives a slight but tolerably complete sketch of those parts of this Act, and of subsequent Acts, which are supposed to protect the lives of those who go down to the sea in ships. Enquiries into shipping casualties, testing of chain-cables, examinations and certificates for masters, engineers and mates, load-line, seamen's food wages and savings-banks, regulations for preventing collisions at sea, limitation of shipowners' liability, and last, but not least, Mr. Plimsoll, are amongst the subjects touched upon by Mr. Roscoe. Of all these we shall hear more when the evidence of Mr. Chamberlain's Committee now sitting is published. Of the practical efficacy of much of this legislation we confess that we have not a high opinion. However, there it is, and, as Mr. Roscoe says, the sooner it is codified and put into an intelligible form the better. At present even lawyers are hopelessly bewildered by the multiplicity of Acts.

A Treatise on the Law of Dower. By Charles H. Scribner. With additional Notes and References, by Alfred I. Phillips. Philadelphia: T. & J. W. Johnson & Co. 1883. La. 8vo. 2 vols. 969 and 860 pp.

In this book the author has collected and arranged in a convenient form the rules and principles of the law relating to the right of Dower; a subject which occupies (as he states) a prominent and important place in the American Law of Real Property.

The author discusses not only the Law of Dower strictly so called, but also the Law of Marriage and Divorce, the Law of Alienage, and some important questions arising on other parts of the Law of Real Property. He also discusses the rules of the Common Law pertaining to these matters. As the discussion, generally speaking, takes an historical form, the work may occasionally be found useful to the English lawyer, as well as to the American practitioner for whose use it is primarily intended, not only in cases relating to the American Law of Dower, but also in cases governed by the English law. See, for example, chapter xiv, 'Dower in Determinable Estates.'

A Complete Collection of Practice Statutes, Orders, and Rules. By Alfred Emden and E. R. Pearce-Edgcumbe. London: Stevens and Haynes. 1885. La. 8vo. lxvi and 1378 pp.

The comprehensive title of this work of practice creates expectation, and it is no mean praise to say that the performance fairly equals the promise. Aiming at completeness, the author goes back to early times, and with something of affectation commences with the statute 3 Edw. I. c. 35 (A.D. 1275), against champerty and embracery. Then (Op. cit. p. 4) he gives us the statute 3 Edw. I. c. 29, to the effect that if 'a pleader beguile the Court' he shall be imprisoned for a year and a day. These and similar Acts would be searched for, if wanted, elsewhere, and they seem therefore somewhat out of place among the Rules and Orders of the Supreme Court.

It is a good point that besides the Statutes, Rules and Orders, Mr. Emden gives the Notices issued by the Registrars and like authorities; a kind of information often difficult to find. Thus we found the Registrar's notice directing the usual addition to the title of an administration action set out here (Op. cit. p. 1136), though we had sought in vain elsewhere.

We must add that we wonder at what George Eliot calls the 'physique' of the book. Probably the publishers know best, but a division of this somewhat cumbrous work into two moderate-sized volumes would have seemed more convenient for the public.

Voters and their Registration. Comprising the Representation of the People Act, 1884; the Registration Act, 1885; the Redistribution of Seats Act, 1885; and the Medical Disqualification Removal Act, 1885; with Notes and Index. By John James Heath Saint, Recorder of Leicester. London: Butterworths. 1885. 8vo. xvi and 290 pp.

The practical demand which calls forth this work is evident. Mr. Saint's book has the merits of conciseness and handiness, and a generally workmanlike air. More we cannot say until we have obtained a report of its utility in the hands of those persons (not necessarily lawyers) who will have most occasion for it.

The Student's Guide to Prideaux's Conveyancing, &c. By John Indermaur. Second Edition. London: George Barber. 1885. 8vo. 117 pp.

The Student's Conveyancing: being specially intended for the use of Candidates at the Final and Honors Examinations of the Law Society. By Albert Gibson and Robert McLean. London: Reeves and Turner. 1885. La. 8vo. lx and 552 pp.

Mr. Indermaur's manual is a neat little book, and looks as if its success (for it has quickly reached a second edition) was well deserved. Prideaux and his commentators are to the present writer, who was brought up in the school of 'Davidson's Conveyancing,' *diversae scholae auctores*, and we therefore do not enter on minute criticism. We notice with some surprise a suggestion, very properly cited by Mr. Indermaur only to be dismissed, that an infant's contract for the purchase of land is affected by the Infants Relief Act of 1874.

Messrs. Gibson and McLean's work is more ambitious. The authors observe that most existing books of conveyancing 'are increased in bulk

and cost by precedents and forms, which in our experience the average law student seldom or never reads.' If such is the fact, the average law student will never be a sound lawyer, and we are sorry for him and his future clients. And if he relies on Messrs. Gibson and McLean, or any other instructors whatever, however industrious and ingenious, to enable him to dispense with knowledge of the actual operative forms and authentic texts of the law, the latter end of him will surely be confusion. It is however possible, not probable, that he may in this manner pass his examinations with a little less trouble, much more risk, and a total loss of ultimate profit. We are far from saying that books of this kind may not be valuable when rightly used, that is, as a guide to the authorities, not a substitute for them. In which manner Messrs. Gibson and McLean expect or desire their book to be used is not quite clear to us. We notice one or two misprints in the names of well-known cases.

La Femme et le Droit. Étude Historique sur la Condition des Femmes. Par Louis Bridel. Paris and Lausanne. 1884. 8vo. 148 pp.

M. Louis Bridel is of opinion that J. S. Mill's 'Subjection of Women' 'peut être considéré à bon droit comme l'un de ces ouvrages nobles et rares qui restent à l'éternel honneur de leur siècle et de leur auteur.' This will sufficiently indicate the general tone of his work. Writing for French readers, M. Bridel points his most detailed and severe censure at the provisions of the Code Napoléon relating to marriage, adultery, and *séparation de corps*. These provisions were a reaction from the short-lived legislation of the Republic, which aimed at complete equality. Divorce was allowed by the Code as it first stood, but one of the first acts of the Bourbon restoration was to suppress it, and it was re-established only the other day. M. Bridel has no difficulty in showing that the French Code is less favourable to women than any other modern European system; but we do not think his manner of argument is likely to make much impression on readers who are not already predisposed to agree with him. A better acquaintance with English law, of which M. Bridel's knowledge is evidently slight and second-hand, would have enabled him to strengthen his case, and to avoid some exaggeration elsewhere in speaking of the advances, great as they certainly are, made on the old common law of husband and wife by modern American legislation. Some of his general statements about European institutions would also have been altered or qualified. We do not allude to the Married Women's Property Act of 1882, which is not noticed at all in the text: M. Bridel is aware of its existence, and explains in a short preface that his book has been in print for two years, and the publication has been delayed by accident. The historical and comparative part of the book shows a competent knowledge of the sources of information or speculation on the origin of the family and the like which have now become the common property of students. But we cannot say much for the writer's discrimination or impartiality. He is of the school for whom the tyranny of man is everywhere in history, and the desire of oppressing women the sole motive of legislators. 'La femme occupe une place très effacée dans l'histoire du peuple juif' is an odd thing to say of the nation which counts Rachel, Miriam, and Deborah among the prominent figures of its early legends, Esther among those of its revival, and which produced the brilliant romance of Judith almost with its latest breath of independence. And surely M. Bridel must have read *Athalie* at school; but then it is the

controversial economy of his party to say nothing about bad women of ability. Moreover, it is well known that the Genevese and the Vaudois deem themselves to speak and write much better French than the Parisians, so peradventure they do not read Racine at Lausanne. Again, we have heard of a heroine in the Book of Maccabees; but the Vaudois are Protestants, and perhaps, like some British Protestants, think that the habit of reading the Apocrypha is Popish and therefore sinful.

A Handbook of Public International Law. By T. J. Lawrence. Cambridge: Deighton, Bell & Co. 1885. 8vo. xi and 120 pp.

The Deputy Whewell Professor of International Law in the University of Cambridge has produced a very neat epitome of his subject, such as would be the result of adding a little finish of form to carefully prepared lecture notes. It ought to be of considerable value to teachers; but we could wish it were possible to keep it out of the hands of a certain sort of learners, who will carefully avoid extending their reading beyond it, and may peradventure suck out of unwary examiners no small advantage. Mr. Lawrence is probably not unaware of the danger, for he has wisely omitted to give specific references, which might be learnt by heart and used to make a false show of verified knowledge.

The Scottish Law Review and Reports of Cases in the Sheriff Courts, &c. Glasgow: William Hodge & Co. Published monthly. No. 1, January; No. 7, July, 1885.

We have received Nos. 1 and 7 of this series, of which we hope to see more. The enterprise of publishing, as collateral to the Reports of the Court of Session sitting at Edinburgh, reports of selected cases from the Sheriff-Courts and of decisions of the Court of Session on appeal from those Courts, is an extremely useful one. The decisions of the Court of Sessions in Scotland have, upon points where English decisions are inconclusive, been admitted as authority by judges of the Superior Courts in England. But it must be allowed that there are large classes of cases scantily represented in the ordinary reports of the Court of Session, on which the recorded decisions of the local judges, especially in the great commercial centres, will be extremely valuable. Having jurisdiction in civil cases (with certain exceptions) unrestricted in respect of money value, the Scotch acting sheriff acquires, in some classes of questions, an experience greater than that of many judges of the Superior Court. This extensive jurisdiction, with the addition of important criminal functions, tends to give to the ancient office of the sheriff a weight which the ability and learning of most of those who hold it is well calculated to maintain.

A class of cases in which the experience of the Sheriff-Courts will be found of general interest arises under the Employers' Liability Act. The principle upon which that Act is founded was suggested by the Scotch decisions before the importation by the House of Lords of the English presumption that the servant undertakes, as incident to his employment, all risks arising from the negligence of persons in the same employ; and it is interesting to see how the principle of the new statute is applied by the local courts of the country where it is indigenous.

So far as we can judge from the early numbers, the Scottish Law Review

gives promise of well carrying out the enterprise entered on. The original articles in the Review are chiefly of local interest, but are instructive as showing the topics which at present engage the attention of the various bodies of Scotch law-agents.

Powell's Principles and Practice of the Law of Evidence. Fifth Edition. By JOHN CUTLER and EDMUND FULLER GRIFFIN. London: Butterworths. 1885. 8vo. xxxii and 732 pp.

POWELL'S Law of Evidence, which comes in length about midway between Stephen's Digest and Taylor on Evidence, has reached a fifth edition. It is shorter than its predecessor, mainly by reason of 'the Indian Evidence Act being taken out of the Appendix, and all references thereto being eliminated from the body of the work.' These omissions are justified by the Editors on the ground that 'there are now several text-books available on the Law of Evidence in India,' and no doubt the justification is good if the object is merely to present the reader with an account of the law of Evidence in England. On the other hand, inasmuch as the work would seem to be best suited for students—practitioners being supplied with all they want, in whichever form suits their taste, in the two standard works we have mentioned—it is perhaps a little to be regretted that opportunities of valuable collation have been lost. At the same time, the English law of Evidence requires only the amendment embodied in Lord Bramwell's Bill in 1884, and in the Government measure of 1885 (whose career was of the obscurest), to make it probably as nearly final as it is given to modern law on any limited subject to be. It is creditable alike to the ingenuity of the profession and to the industry of the Editors that the ten years which have elapsed since the issue of the fourth edition should have supplied no fewer than 330 fresh decisions on the law of Evidence. The devotion of a separate 'part' to written evidence is perhaps not altogether philosophical, as an oral statement, a marked paper, and a broken stick, are all alike objects perceptible to the senses of the jury; but it is of course not without its conveniences. The Appendix, in respect of statutes, rules, and forms, is highly meritorious, and the whole edition is calculated to maintain the reasonably high reputation of Mr. Powell's work. The Index leaves something to be desired. Neither 'Prisoners' nor 'Accused Persons' figure in it, while some pages are occupied by the heading 'Evidence,' under which, in a book on Evidence, no one in his senses would ever think of looking for anything. When will the editors of books on Evidence take notice of the extremely important provisions of sect. 4 of the Explosives Act, 1881?

We have received the following letter from the learned Editor of the *American Law Register*:—

Philadelphia, July 17, 1885.

DEAR SIR,—In the notice of Mr. Eversley's Law of Domestic Relations, page 381 of the July Number of THE LAW QUARTERLY REVIEW, you say that Mr. (now Lord) Fraser 'conceived the plan of grouping the various subjects . . . under the title of the Personal and Domestic Relations.' 'Mr. Fraser's work . . . appeared in 1846 . . . and in the meantime have appeared the American works of Mr. Reeve,' &c. The fact is that Reeve's 'Domestic Relations' was published in 1816, thirty years before Mr. Fraser's.

Judge Tapping Reeve, a Justice of the Supreme Court of Connecticut, established at the beginning of this century a Law School at Litchfield, Connecticut, which was I believe the first law school, *in its modern sense*, established anywhere for instruction of students in the common law. It was at least the first American law school, and obtained great fame, very many of the most eminent lawyers of the early half of this century in America having been pupils there. Reeve's 'Domestic Relations' was a *résumé* of his lectures in that school. It has gone through several editions, and still holds its own as a recognised text-book in this country, though Reeve himself died in 1823.

Whatever credit there is due to the conception of grouping the subjects under that title belongs to Judge Reeve, and not to Mr. Fraser.

Yours respectfully,

JAMES T. MITCHELL.

[The main purport of the letter speaks for itself, and we have only to regret the slip it points out. We should be glad to receive further information as to the origin and history of Law Schools in America, a matter of which very little is known in this country. It would be appropriate, now that there is something like a revival of systematic legal education.—ED.]

NOTES.

WE are informed by the Rev. A. Hawkins Jones, of Bedford (who is a graduate in law as well as a clerk in orders), that the experiment of teaching law in a public school has been tried with considerable success. A class was formed at the Bedford Modern School last winter to hear a course of lectures on the Elements of the Law of Contract. Ninety boys attended, and the results were such, in the judgment of the teacher, as to show that fully half of them had followed the lectures with satisfactory intelligence. This confirms the truth of what Mr. Justice Stephen and others have for many years insisted upon—that law is in itself a deeply interesting subject, and in order to be generally recognised as such, only needs to be put before people in the right way. We should be glad to see the rudiments of our constitutional and institutional law systematically taken up in connexion with the teaching of English history. Not only English citizens, but English politicians, often go sadly astray for want of knowledge of this kind; and our current history-books themselves would be much better for more of it. The average handbook-writer, and consequently the average reader, is apt to think it an immaterial detail whether a man's head was cut off with or without a legal trial and sentence. Instruction on a special subject like the law of contracts is not so easily procurable; schoolmasters cannot be expected to add the laws of England to their other burdens. Constitutional law can be learnt and taught, to a considerable extent, from books alone, and is thereby distinguished from the current law that concerns men's common affairs. But where, as at Bedford, favourable circumstances make it possible, the enterprise is very commendable, and the example acceptable by way of a counsel of perfection.

The decision of *The Gas Light and Coke Co.* v. *Vestry of St. Mary Abbott's, Kensington*, in the Court of Appeal, 15 Q. B. D. 1, may be thought at first sight to do little credit to the law. But what it really shows is the absurdity of our methods—or want of method—of local government. If the wisdom of Parliament makes the gas-pipes under a public street the property of a private company, while it puts the duty of repairing the surface on the shoulders of a wholly different public body, collisions of interest must be expected to occur. The vestry may repair the road as they please—subject to the rights of the Gas Company. It may be that, in the present state of London traffic, they cannot repair efficiently at all without using steam rollers. But the Court has no jurisdiction to mould its interpretation of statutory rights by external considerations of convenience.

Page v. *Morgan* (C. A.), 15 Q. B. D. 228, re-affirms the principle which has been laid down in other cases that an 'acceptance' of goods which will satisfy the seventeenth section of the Statute of Frauds need not be such an acceptance as would preclude the owner from rejecting the goods on examination as not being equal to sample. The noteworthy point in the line of decisions, of which *Page* v. *Morgan* is the last, is that a matter which appears to belong to the most technical part of English law really illustrates the principles of general jurisprudence with regard to the nature of possession. The 'receipt and acceptance' required by the Statute of Frauds, taken together, amount to a transfer of possession. When a purchaser of goods 'actually receives,' there is a physical transfer of the goods. When he accepts them he shows the *animus possidendi*, in other words the 'possession of the goods' is transferred, and the rules as to the necessary acceptance are simply rules as to the *animus possidendi* required to affect such transfer. The moment the matter is looked at in this light, it is clear that possession may be transferred and the requirements of the seventeenth section be thus satisfied, without the possessor having adopted the position of owner. The statute is satisfied if there be a transfer of possession (actual or constructive) even though there be not a transfer of ownership. It would seem to follow that, as against a mere wrongdoer, the person who has 'received and accepted' within the Statute, even if he has not physical control of the goods, is entitled to bring trespass. This is now a speculative point in England, but it may be material in those common-law jurisdictions where the forms of action are still preserved.

In *Elliott* v. *Hall*, 15 Q. B. D. 315, it is held that the seller of coals who sends them to the buyer in a truck with a loose trap-door in it is liable to the buyer's servants if they go through the trap-door in the course of unloading the coals. This is a wholesome decision, and, though well within the existing authorities which distinguish persons 'invited to enter' upon property from mere licensees, will help to strengthen the law at a point where it was formerly much too weak. Perhaps it is not too much even to hope that the Court of Appeal will some day follow the leading New York case of *Thomas* v. *Winchester*, which, though regarded with a kind of suspicious fear by English commentators, is in our opinion very good law.

The decision of the Court of Appeal in *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. 750, may be taken as finally disposing of the opinion (in which the late Vice-Chancellor Malins stood alone among recent autho-

rities) that the burden of a covenant, not capable of being construed as a grant (as in *Morland* v. *Cook*, 6 Eq. 252), and not made between landlord and tenant, can run with land. It is true the Court did not say in terms that such a doctrine is legally impossible; but they did say in effect that they could not think of any case in which it would be applied. The case also confirms, if confirmation were needful, the recent decisions that where a covenant is not merely restrictive, but involves the active expenditure of money or money's worth, and does not run with the land at law, it is not within the principle of the decisions in equity which have enforced restrictive covenants against assigns taking with notice.

An infant may be guilty of larceny as a bailee, though the goods were delivered to him on an agreement made void by the Infants' Relief Act: *Reg.* v. *M^c^Donald*, 15 Q. B. D. 323. The ground taken is that there may well be a bailment without any contract. The infant at all events had a special property. But it seems to us arguable, moreover, that, the terms on which the goods were expressed to be delivered not constituting an agreement of which the law could take notice, the law must imply a contract on the infant's part to return the goods on demand, subject to a lien for any part of the hire or purchase-money which has been paid under the void agreement. Otherwise the infant may keep the goods for nothing, which is absurd.

Where A. is B.'s agent to receive from C., in a certain event, money which C. could not be legally compelled to pay, but which he does not commit any offence or wrong by paying, or B. or A. by receiving it; and if the event happens, and C. does choose to pay the money to A.; there A. is not entitled, by reason only that C. was not compellable to pay, to refuse payment over to B. This does not appear difficult in principle, but the Court of Appeal has had to re-assert it in *Bridger* v. *Savage*, 15 Q. B. D. 363. In *Beyer* v. *Adams*, there overruled (and most properly not reported by the authorised reporter), Stuart V.C. appears to have fallen into the error of supposing a wagering agreement to be not only unenforceable but illegal. On the other hand, the decision of Grove J. in *Perry* v. *Barnett* is now affirmed, 15 Q. B. D. 388; in other words, a dangerous but plausible attempt to extend the application of *Read* v. *Anderson*, 13 Q. B. D. 779, has finally failed.

We are not aware that 'aliens not the subjects of any foreign State' have found a place in the classification of any publicist of repute. Most lawyers would say that the phrase involves a contradiction in terms. Yet such a status exists. It has been invented by the Christian and civilised government of Roumania for the purpose of continuing to persecute the Jews in evasion of the obligations undertaken by it under the Treaty of Berlin as part of the consideration for Roumania being recognised as an independent State. By this ingenious definition Roumanian Jews are excluded from the benefits alike of citizenship and of comity. The particulars of this gross and scandalous violation of good faith and the public law of Europe are given in Mr. D. F. Schloss's pamphlet, 'The Persecution of the Jews in Roumania,' published by Mr. Nutt and sold at a nominal price.

The Law Reports for July, August, and September contain (if we exclude cases determined by the House of Lords and the Privy Council) 120 cases. Of this number 77 are decisions of the Court of Appeal. The Reports therefore are now in effect filled with judgments given by the Court of Appeal interspersed with the comparatively unimportant decisions arrived at by Courts of first instance. These are facts to which the attention of the Council of Law Reporting should be directed; they forcibly suggest the conclusion that the decisions of the Court of Appeal should be published in separate volumes. Our judicial system is changing, our scheme of reporting should change with it.

The proceedings of the Conference on Commercial Law being held at Antwerp as our present Number goes to press, and the publications issued in connexion therewith, will be noticed in our January number.

CONTENTS OF EXCHANGES.

(The titles of articles in foreign reviews are given in the original, translated, or abridged in English, without any fixed rule, as appears in each case most convenient for our readers.)

The Journal of Jurisprudence and Scottish Law Magazine. Vol. xxix, Nos. 343 and 344, for July and August, 1885. Edinburgh: T. & T. Clark.

No. 343. Technical Objections and Escapes from Justice, no. iii.—The Transmission of Trust and Executory Funds—The Lunacy Laws—School Board Elections—Reviews, Notes, &c.

No. 344. Technical Objections and Escapes from Justice, no. iv.—Patents, Designs, and Trade-Marks Act, 1883—The Origin and History of the High Court of Justiciary, no. vii.—Notes of Cases, &c.

Canada Law Journal. Vol. xxi. 1885. Toronto: C. Blackett Robinson.

No. 11, June 1. Treason-felony in the North-West—Recent English Decisions—Notes of Canadian Cases, &c.

No. 12, June 15. Taxing-officers and Counsel Fees—Administration of Real Assets—Choses in Action—International Responsibility for Dynamite Warfare—Reports, Book Review, Notes, &c.

No. 13, July 1. Criminal Jurisdiction in the North-West Territory—Jurisdiction of Ontario Courts in Manitoba and the North-West—Notes of Cases, English and Canadian—Law Society (official résumé of proceedings)—Notes, &c.

The Canadian Law Times. Vol. v, Nos. 6 and 7, June and July, 1885. Toronto: Carswell & Co.

No. 6. Ontario Legislation, 1885—Legislative Interference with Contract—What constitutes Registration—Reviews, Notes of Cases, &c.

No. 7. Creditors' Remedies against Companies apart from the provisions of the Winding-up Acts—Reviews, Notes of Cases, &c.

The Cape Law Journal. Vol. 2, Part 3, June 1, 1885. Grahamstown: for the Incorporated Law Society of the Cape of Good Hope, Richards, Slater, & Co.

Trial by Jury—The Liabilities of Registered Accredited Agents—Proposed Penal Code for the Transkeian Territories[1]—The late Earl Cairns—Book Review—Digest of Cases, Notes, &c.

The American Law Record. Vol. xiv, No. 1, July, 1885. Cincinnati: Bloch Publishing Company.

Reports in Supreme Court, U. S., Pennsylvania, Michigan, Ohio, and Wisconsin—Current Items—Digest.

Revue de Droit International et de Législation Comparée. Vol. xvii. 1885. Brussels and Leipzig.

No. 3. The Vienna Congress and the Berlin Conference (Sir Travers Twiss)—The Colonial Policy of Italy (E. L. Catellani)—The English Draft

[1] [The writer of this article commits the mistake of attributing the Indian Penal Code to Mr. Justice Stephen: we thought Macaulay's relation to it was better known.—Ed.]

Penal Code of 1879, no. 1 (O. Q. van Swinderen)—International Law of the Roman Republic (G. Fusinato)—Book Reviews and Notices.

No. 4. The Law of Nature and Private International Law (Brocher de la Fléchère)—International Law as to Railways in War-time (L. de Stein)—Points of International Law in the Anglo-Russian Dispute (F. H. Geffcken)—The Oxford Resolutions on Extradition (A. Rolin)—Reviews.

Bulletin de la Société de Législation Comparée. 16me Année. No. 6, June, 1885; No. 7, July, 1885. Paris.

Étude sur le colonage partiaire particulièrement en Dalmatie (Pappafava, Fr. transl. by Arnaud)—Reports and Reviews.

Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart. Vol. xii, Part 4. Vienna: Alfred Hölder, 1885.

Bemerkungen zur 'Nordbahnfrage' (zur Lehre vom Privileg, Staatsrechtlichen Vertrag und von der Enteignung) (Randa)—A question on the law of Pledge under the Austrian Civil Code (Schrutka-Rechtenstamm)—Zur Lehre von der Gesammtsache (Ernst Tiel)—Book Reviews.

Archivio Giuridico. Vol. xxxiv, Nos. 5 and 6 (completing the volume). Pisa, 1885.

The proposal to introduce the Swiss *Referendum* in Italian local government (concluding against it, with or without modification), (Crivellari)—History of Divorce in Roman Law (Piccinelli)—Can the analogy of general average be applied to damage by fire on land? (as between, e. g., occupiers of different floors in the same building), (Padula)—An apparent inconsistency in the Italian Civil Code (Polacco)—Critical note on Festus (Ferrini)—Aryan Comparative Law (Cogliolo)—The Custumal of Visso, ed. Santoni (Cogliolo)—Roman Law in Current Cases—Legal Science in Germany—Book Reviews.

Il Filangieri: Rivista Giuridica Italiana di Scienza, Legislazione e Guirisprudenza. Naples.

Vol. 10, Part 2, No. 5, May, 1885. A special number devoted to reports of cases in Courts of Cassation and other Courts in the kingdom of Italy.

Vol. 10, Part 1, No. 7, July. Assignment of Debts free of Equities (Spinelli)—Proposals for a Law of Extradition (Masucci)—Della rinunzia da parte del venditore dell' ipoteca legale e della relativa iscrizione (Lomonaco)—The application of Commercial Law to the sale of Immovable Property (Marghieri)—Reviews, &c.

Rassegna di Diritto Commerciale Italiano e Straniero. Turin.

Vol. 2, Part 9. Recent German changes in Company Law compared with the Italian Code, concluded (Vitalevi)—Reviews—Reports of Cases. Signor Salvatore Sacerdote's translation of the Bankruptcy Act 1883 is now reprinted from the *Rassegna* with a preliminary essay which compares our Act with the provisions of other codes (La legge inglese sul fallimento, volgarizzata dall' avv. Salvatore Sacerdote, &c. Torino, 1885. 8vo. pp. 32 and lxxii).

Vol. 2, Part 10. The Contract of Life Assurance (Vincenzo Prodi)—Insurance against Flood (I. Pithon)—Reviews, Notes of Exchanges, Reports, &c.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

DIGEST OF CASES

REPORTED IN

THE LAW REPORTS, THE LAW JOURNAL, THE WEEKLY REPORTER,

AND *THE LAW TIMES,*

FROM

JULY TO SEPTEMBER 1885.

By EDWARD MANSON,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

Annuity.—*Valuation—Arrears—Insolvent estate — Government tables.*—Where a husband had covenanted to pay his wife an annuity under a separation deed and the annuity had at the husband's death fallen into arrear, the Court (the estate being insolvent) for the purpose of apportionment ordered the present value of the annuity to be taken according to the Government tables with arrears up to the same date. (Pearson, J., Feb. 3, 1885). *Delves* v. *Newington*, 52 L. T. R. 572.

Arrest.—*Ne exeat Regno—Debtors' Act—'Default' by Trustee—Debt due and payable.*—An order was made against a trustee for payment of a sum of money within seven days after service of the order. Service of the order could not be effected, and the plaintiff, believing the trustee intended to depart out of the jurisdiction, applied for a writ of *ne exeat regno*: Held, that the trustee had not made default within sect. 4 of the Debtors' Act, 1869, and that the writ ought not to issue. The writ will not issue under sect. 6 unless there is a debt, legal or equitable, due and payable. (C. A., March 11, 1885.) *Colverson* v. *Bloomfield*, 29 Ch. D. 341; 52 L. T. R. 478.

Attachment of Debts.—*Garnishee — Examination — Order Absolute—Unsatisfied execution.*—An order may be made under O. 42 r. 32 for the examination of a garnishee debtor against whom a garnishee order absolute has been made. (March 26, 1885.) *Cowan* v. *Carlill*, 33 W. R. 583.

Bankruptcy.—*Act of Bankruptcy—Keeping house—'Intent to delay'—Bona fides.*—A debtor who keeps house in order to avoid service of a writ, though he does so honestly with the hope of paying his creditor, commits an act of bankruptcy within the meaning of sect. 4 (d) of the Bankruptcy Act. (March 19, 1885.) *Richardson* v. *Pratt*, 52 L. T. R. 614.

Act of Bankruptcy—Notice of intention to suspend payment—Offer of Composition.—A debtor called his creditors together and made them an offer of a composition: Held, that this was not giving notice to his creditors that he had suspended or was about to suspend payments of his debts within the meaning of sect. 4 subsect. 1 (h) of the Bankruptcy Act, 1883, so as to constitute an act of bankruptcy. (March 18, 1885.) *Re Walsh*, 52 L. T. R. 694.

Administration of Insolvent Estates—Discovery of Property—Examination—Jurisdiction to order.—Sect. 27 of the Bankruptcy Act, 1883, giving the Court power to summon any person for discovery of the debtor's property does not apply to an administration in bankruptcy of an insolvent estate under sect. 125. Rule 58 of the Bankruptcy Rules, 1883, provides for taking depositions, not for discovery. (May 19, 1885.) *Re Hewitt, Ex parte Hannah.* 15 Q. B. D. 159; 54 L. J., Q. B. 402.

Alimony—Enforcing after Bankruptcy—Debtors' Act.—Future payments of alimony are not proveable in bankruptcy, and may be enforced by committal of the bankrupt under the Debtors' Act. (C. A., May 22, 1885.) *Re Linton, Ex parte Linton*, 15 Q. B. D. 239; 33 W. R. 714; 52 L. T. R. 782.

Arrangement—Approval—Discretion of Registrar—Wishes of Creditors—Evidence—Report of Official Receiver.—Where a registrar acting on the report of the official receiver has in the exercise of his discretion refused to approve a scheme of arrangement, the Court of Appeal will not, unless there are strong reasons for doing so, over-

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rule his decision. The wishes of the creditors ought not to influence the registrar's judgment. The report of the official receiver under sect. 18, subsect. 5, as well as under sect. 28, subsect. 4, is *prima facie* evidence of the truth of the statements contained in it. *Re Wallace, Ex parte Campbell.* (C. A., May 8, 1885.) 15 Q. B. D. 213.

County Court — Jurisdiction — Higher Title of Trustee — Usage of Trade — Solicitor—Right of Audience.—A County Court Judge sitting in bankruptcy has no jurisdiction under the Bankruptcy Act, 1883, or otherwise, to restrain by injunction an action against the trustee in bankruptcy in the High Court, though the action is one arising out of the bankruptcy. The rule that where the title of the trustee in bankruptcy is a higher and better one than that of the bankrupt himself, the Court of Bankruptcy ought to decide the matter is not an inflexible one, but subject in each case to the discretion of the Court, a discretion not to be lightly overruled. Per Brett, M. R. The notoriety of an alleged usage in a trade, as e.g. builders hiring their machinery, is one which should be tried before a Judge of the High Court and a jury. A solicitor has a right of audience before a Divisional Court sitting on appeal from a County Court Judge in bankruptcy. (C. A., April 28, 1885.) *Re Barnett, Ex parte Reynolds.* 15 Q. B. D. 169; 54 L. J., Q. B. 354; 33 W. R. 715.

Creditor's Deed—Claiming Adversely—Estoppel.—Creditors who had claimed adversely to a deed of arrangement not allowed on failing to establish their claim to take the benefit of the deed. (Pearson, J., April 23, 1885.) *Re Meredith, Meredith* v. *Facey,* 29 Ch. D. 745; 33 W. R. 778.

Disclaimer—Lease of Farm—Covenant not to Remove Hay, Straw, &c.—Injunction.—Sect. 11 of 56 Geo. III. c. 50, providing that no assignee of a bankrupt shall dispose of any hay, straw, manure, &c., in any other manner than the bankrupt might have done is still in force. It applies to a trustee in bankruptcy or liquidation under the Bankruptcy Act, 1869, and is enforceable by injunction notwithstanding that the trustee of the covenanting tenant has executed a disclaimer. (C. A., Jan. 28, 1885.) *Lybbe* v. *Hart,* 29 Ch. D. 8.

Examination of Debtor—Right of Solicitor of Creditor to Examine—Written Authority.—A creditor's solicitor is not entitled under sect. 17, subsect. 4 of the Bankruptcy Act, 1883, to examine the debtor concerning his affairs and the causes of the failure, unless authorised in writing to do so. Quære, whether a solicitor denied his right of audience is 'a party' within sect. 43 of County Court Act, 1858. (C. A., May 12, 1885.) *Reg.* v. *Registrar of the Greenwich County Court,* 15 Q. B. D. 54; 54 L. J., Q. B. 392; 33 W. R. 671.

Mutual Dealings—Creditor Accepting Bill after Notice of Bankruptcy—Set-off—Bankruptcy Act.—B. & Sons, who were creditors of *G. & Co.* on a current account, accepted a bill remitted to *G. & Co.*, after notice of *G. & Co.'s* bankruptcy: Held, that *B. & Sons* were not entitled under the mutual dealings section of the Bankruptcy Act, 1883, to set off their debt against the amount of the bill. The line fixing the right of set-off is drawn, as a rule, at the commencement of the bankruptcy. (March 10, 1885.) *Re Gillespie, Ex parte Reid,* 14 Q. B. D. 963; 54 L. J., Q. B. 342; 33 W. R. 707.

Official Receiver—Powers of Sale of Debtor's Property.—An official receiver has all the powers of a trustee in bankruptcy, including the power to sell the debtor's property, perishable or otherwise, pending the appointment of a trustee. (C. A., May 8, 1885.) *Re Parkers, Ex parte Board of Trade,* 54 L. J., Q. B. 372; 15 Q. B. D. 196; 52 L. T. R. 670.

Petition — Dismissal — 'Sufficient Cause' — Arrangement.—The existence of an arrangement by a debtor with his creditors is not a 'sufficient cause' within sect. 7 (3); of the Bankruptcy Act, 1883, for dismissing a petition. (C. A., June 19, 1885.) *Re Watson, Ex parte Oram,* 15 Q. B. D. 399; 52 L. T. R. 785.

Proof—Separate Estate of Partner—Joint Creditors.—Joint creditors cannot prove against the separate estate of a partner who has become bankrupt while any part of the joint estate remains. (December 15, 1885.) *Re Ingham, Ex parte The Trustee,* 52 L. T. R. 299.

Receiving Order—Subsequent Arrest—Payment to avoid—Recovery by Official Receiver.—A creditor by sect. 9 of the Bankruptcy Act, 1883, loses his right to enforce payment of a debt by arresting the debtor as soon as a receiving order has been made, a commitment order not being a process of contempt. (May 11, 1885.) *Re Ryley, Ex parte Stewart,* 15 Q. B. D. 329; 54 L. J., Q. B. 420; 33 W. R. 656.

Secured Creditor—Bills of Exchange—Negotiation—Proof by Bill Holders—Application of Security.—A. & Co. made advances to *B. & Co.* for the purposes of their business, *B. & Co.* giving bills and depositing goods with *A. & Co.* to secure the amount. *A. & Co.* negotiated the bills, and on *B. & Co.* compounding with their creditors the holders of the bills received a composition. *A. & Co.* did not prove, but realized their security and claimed to retain the proceeds against the balance of their

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account: Held, that they were not entitled to do so, but must repay to *B. & Co.* the amount by which the bill holder's composition exceeded what would have been paid if the security had been deducted from the total debt. (May 14, 1885.) *Baines* v. *Wright*, 15 Q. B. D. 102.

Trustee—Power of Appointment—Capacity to Exercise—Death of Bankrupt.—A trustee in bankruptcy cannot under sect. 15 (4) of the Bankruptcy Act, 1869 (Bankruptcy Act, 1883, sect. 44 (ii)) after the death of the bankrupt exercise a general power of appointment vested in the bankrupt at the commencement of the bankruptcy. (Pearson, J., May 14, 1883.) *Re Nicholls & Nixey's Contract*, 33 W. R. 840; 52 L. T. R. 803.

Bill of Exchange.—*Appropriation—Bills drawn against Shipments—Course of dealing.*—The fact that bills of exchange are drawn against shipments does not constitute a specific appropriation of the shipments in favour of purchasers of the bills, and it makes no difference that there is on the face of the bills a direction to the drawer to charge the amount against the shipments, such a direction being only intended to show that the bills are not accommodation bills. (C. A., May. 21, 1885.) *Brown, Shipley & Co.* v. *Kough*, 29 Ch. D. 848; 52 L. T. R. 878.

Appropriation—Bills drawn against Shipments.—*B.* the New York agent of the two firms trading at Pernambuco and Liverpool, in execution of an order given by the Pernambuco firm to the Liverpool firm, shipped goods to Pernambuco and drew bills on the Liverpool firm against the shipments, specifying them on the counterfoils to the bills and discounted the bills (the Liverpool firm keeping the counterfoils) with New York bankers. The Liverpool firm stopped payment, and *B.* telegraphed to the Pernambuco firm to hold the proceeds of the shipments as security. The Pernambuco firm instead applied the proceeds in payment of the balance due to them from the Liverpool firm: Held, in an action by the bankers against the Pernambuco firm, that there had been no specific appropriation of the shipments to the bankers to meet the bills. (C. A., May 5, 1885.) *Phelps, Stokes & Co.* v. *Comber*, 29 Ch. D. 813; 33 W. R. 829.

Colonial Law.—*Cape of Good Hope—Water—Prescription—Licence—Rights of Owner of Springs.*—*H.* in 1820 obtained a licence from the Crown to divert a spring rising in Crown lands on to his farm, and used the water for the period of prescription: Held, that *H.*'s user was not precarious, and that the title acquired by him was not affected by his successor in title having obtained a renewal of the licence. Semble, the owner of land in which springs rise is not by Dutch-Roman law entitled to do what he pleases with their waters. (P. C., March 17, 1885.) *Commissioners of French Hoek* v. *Hugo*, 10 App. Cas. 336.

Company.—*Reduction of Capital—Petition—Advertisement—Dispensing with.*—The Court will not dispense with the advertisement of a petition under the Companies Act, 1877, for confirming a resolution by a Company for a reduction of its capital. (Chitty J., February 20, 1885.) *Re The Consolidated Telephone Co.*, 52 L. T. R. 575.

Winding-up—Rate—Payment in full by Liquidator—Beneficial Occupation—Test.—The liquidator of a company which was being wound up remained in possession of the business premises for the purpose only of completing some of the company's unfinished articles. While he was in possession a rate was made on the company's premises: Held, that the liquidator having remained in possession with a view to the more advantageous realisation of the assets there had been a beneficial occupation of the premises, and that the rate must be paid in full. Held also that the fact of the rate being too high, unless it was shown to be manifestly unjust, was no ground for the Court refusing to enforce it, as the liquidator might have appealed. Per Bowen and Fry L.JJ. Semble, the true test of a beneficial occupation in such a case is the same as in rating cases. (C. A., February 2, 1885.) *Re National Arms and Ammunition Co.*, 33 W. R. 585.

Contract.—*Illegality—Indemnification of Bail—Recovery of Security—Vouching Illegal Transaction.*—*J.* entered into a bailbond for *H.*, who was in prison under a criminal conviction, in consideration of *H.* paying him 50*l.*, to meet the bond if it was forfeited. *H.* afterwards brought an action to recover the 50*l.*: Held, that the contract was illegal as being contrary to public policy, and as *H.* could not make out his case without vouching the illegality, the Court would not aid him to recover it. (C. A., May 1, 1885.) *Hermann* v. *Jeuchner*, 54 L. J., Q. B. 340; 33 W. R. 606.

Copyright.—*Barometer Face—'Book'—'Chart or Plan'—Copyright Act.*—The dial or face of a forecast barometer cannot be registered as 'a chart or plan' within the meaning of the Copyright Act, 1842, s. 2. (Chitty J., Jan. 20, 1885.) *Davis* v. *Committi*, 54 L. J., Q. B. 419; 52 L. T. R. 539.

County Court.—*Stay of Proceedings—Action not capable of being brought in High Court—Employers' Liability Act—County Court Act.*—The right given by s. 39 of the County Court Act, 1856, of staying an action of contract over 20*l.* or tort over 5*l.* does not apply where the action, as e.g. under the Employers' Liability Act, is one which cannot be brought in the High Court. (C. A., April 29, 1885.) *Reg.* v. *Judge of the City of London Court*, 14 Q. B. D. 905; 54 L. J., Q. B. 330; 33 W. R. 700; 52 L. T. R. 537.

Criminal Law.—*False Pretences—Bill of Sale—Grantor selling goods—Pretence of ownership.*—*S.*, a farmer, gave a bill of sale of all his farming stock, live and dead, to secure an advance. *S.* afterwards, with a fraudulent intention as the jury found, offered to sell and sold to the prosecutor cows and sheep to a large amount: Held, that *S.* had held himself out as the owner and was properly convicted of obtaining money by false pretences. (C. C. R. 131; H. 85.) *Reg.* v. *Simpson*, 52 L. T. R. 772.

Larceny—Infant Bailee.—An infant who had hired furniture fraudulently removed and sold it without the knowledge of the owner: Held, that he had been properly convicted of larceny as a fraudulent bailee under 24 and 25 Vict., c. 96, s. 3, though the contract arising out of the bailment was not binding on him. (C. C. R., Aug. 20, 1885.) *Reg.* v. *Macdonald*, 15 Q. B. D. 323; 33 W. R. 735; 52 L. T. R. 583.

Damages.—*Measure of—Breach of Contract—Sub-contract—Consequential loss—Damages paid by Vendee.*—Manufacturers in England contracted to supply *G.*, a French merchant, with a quantity of sheepskin rugs, of a particular description, knowing that *G.* wanted them to fulfil a contract with a customer. The manufacturers broke their contract. The goods were not procurable in the market: Held, that the manufacturers were liable to pay *G.* not only the profits which he would have made, but also the amount of the damages so far as reasonable which *G.* had been compelled by a French Court to pay to the customer. An original vendor is liable to so much of the sub-contract as is made known to him, but no more. (C. A., April 28, 1885.) *Grebert-Borgnis* v. *Nugent*, 15 Q. B. D. 85.

Deed.—*Execution—Note Qualifying Signature—Receipt of Money—Estoppel.*—A bank executed a deed of general release, appending a note restricting the release to particular claims: Held, that the note was inoperative: Held also, that the bank having received a sum under the deed which by its terms the bank would not have been entitled to unless it had executed the deed, it could not repudiate the execution. (P. C., February 17, 1885.) *Exchange Bank of Yarmouth* v. *Blethen*, 10 App. Cas. 298.

Defamation.—*Libel—Criminal Information—Fiat of Public Prosecutor—Newspaper Libel Act.*—Sect. 3 of the Newspaper Libel and Registration Act, 1881, making the fiat of the Public Prosecutor a condition precedent to a criminal prosecution against the proprietor, publisher, or editor of a newspaper, does not apply to a criminal information filed *ex officio* by the Attorney-General, nor to criminal informations for libel at the instance of private persons. (C. A., January 16, 1885.) *Yates* v. *Reg.*, 14 Q. B. D. 648; 54 L. J., Q. B. 258; 52 L. T. R. 305.

Domicile.—*Abandonment—Domicile of Choice—Intention—Will—Scotch Terms—Construction.*—*F.*, a Scotchman, acquired an English domicile. He afterwards went to France for two years, returning to die in England. Semble he had not abandoned the English domicile so as to revive the domicile of origin. *F.*'s will was drawn by a Scotch lawyer and contained some technical words of Scotch law: Held, no sufficient evidence of an intention that it should be construed as a Scotch instrument. (C. A., April 30, 1885.) *Bradford* v. *Young*, 29 Ch. D. 617.

Domicile of Choice—Change—Intention—Entering British Army.—Service in the British army is no evidence of a person's intention to change his domicile, whether the existing domicile be one of origin or of choice. (Pearson, J., June 25, 1885.) *Re Macreight, Paxton* v. *Macreight*, 33 W. R. 838.

Ecclesiastical Law.—*Ecclesiastical Dilapidations Act—Report of Surveyor—Sequestrator—Repairs—Disallowance.*—The sequestrator of a benefice in passing his accounts will not be allowed monies expended by him, though *bonâ fide*, on repairs of the buildings, in excess of the estimate of the Diocesan Surveyor made under the Ecclesiastical Dilapidations Act, 1871. (June 4, 1885.) *Kimber* v. *Paravicini*, 15 Q. B. D. 222; 54 L. J., Q. B. 471.

Estoppel.—*Res Judicata—Setting out Pleadings—Cross Actions in Ireland and England—Notes of Irish Judge—Admissibility.*—Where a defence of *res judicata* is pleaded the pleadings in the concluded action need not be set out. The Court may however look at the pleadings to see whether they raised the same issues. Per Pearson J. Query whether a plea of *res judicata* can be set up in bar of an action commenced before the judgment. The note of proceedings at a trial drawn up by the presiding judge of an Irish Court for the use of the Divisional Court in Ireland

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on an application for a new trial is admissible as evidence in an English action of what took place before the Judge. (C. A, February 26, 1885.) *Houston* v. *Marquis of Sligo*, 29 Ch. D. 448.

Evidence.—*Entry by Deceased Person—Benefit—Admission against Interest—Reviving Statute-barred Debt.*—An entry in a deceased person's diary of the payment to him of interest on a debt after the debt is statute-barred is not an admission against the deceased person's interest, as it may be evidence in his favour to revive the debt. (North, J., May 18, 1885.) *Newbould* v. *Smith*, 33 W. R. 690.

Executor.—*Administration of Assets—Judgment Creditors—Priority—Registration—Re-registration.*—Priorities of registered and re-registered judgments determined on the principle laid down in *Beavan* v. *Lord Oxford* (4 W. R. 112). (Chitty, J., April 22, 1885.) *Re Lord Kensington, Bacon* v. *Ford*, 29 Ch. D. 527; 33 W. R. 689.

Personal Judgment—Administration Judgment—Restraining Proceedings.—Where a creditor had obtained judgment in a County Court against an executrix for a debt due to him from her testator, and a few days afterwards judgment was given for administration of the testator's estate and a receiver appointed, the Court refused to restrain proceedings against the executrix in the County Court, but directed the receiver in the administration action to pay the debt without prejudice to whether it should be allowed the executrix or not. (Pearson, J., March 6, 1885.) *Re Womersley, Etheridge* v. *Womersley*, 29 Ch. D. 557.

Retainer—Balance Order against Deceased Contributory—Judgment—Joint Debt.—A balance order made against a deceased contributory under the Companies Act, 1862, Gen. Ord. r. 35, does not oust the executor's right of retainer for a specialty debt, such balance order not being a judgment, but only giving the creditor a right to be paid in due course of administration. An executor may retain a debt due to him jointly with others. (V.C. B., No. 41, *ante*, *reversed*. C. A., June 5, 1885.) *Re Hubback, International Marine Hydropathic Co.* v. *Hawes*, 33 W. R. 666.

Retainer—Debt not enforceable under Statute of Frauds—Statute of Limitations—Analogy.—Although an executor or administrator is allowed to pay or retain a debt barred by the Statute of Limitations, the exception is an anomalous one, and will not be extended so as to enable an executor or administrator to pay or retain a debt not enforceable under the Statute of Frauds. (C. A., March 24, 1885.) *Re Rowanson, Field* v. *White*, 29 Ch. D. 358; 33 W. R. 604.

Retainer—Life Interest—Person to sue—Trustee of Settlement.—A widow as executrix of her husband claimed to retain out of his estate the value of her life interest under her marriage settlement, the funds of which he had misappropriated: Held, that she had no such right of retainer, the surviving trustee of the settlement being the proper person to sue. (C. A., May 18, 1885.) *Re Dunning, Hatherley* v. *Dunning*, 33 W. R. 760.

Game.—*Rearing Game—Overstocking Land—Damage to adjoining property—Reasonable user.*—The lessor of a farm who had reserved the right of sporting and also certain woods and coppices, brought several hundreds of pheasants in coops into the woods and coppices for breeding. The pheasants so bred flew on to the lessee's land and did damage: Held, that the lessor had exercised his ordinary right of rearing game to an undue extent and was liable for the damage. (May 12, 1885.) *Farrer* v. *Nelson*, 15 Q. B. D. 258; 54 L. T., Q. B. 385; 33 W. R. 800.

Guarantee.—*Joint Guarantors—Death of one—Banking Account—Estoppel by Conduct—Lord Tenterden's Act.*—A joint guarantee is not determined by the death of one of the guarantors if the survivors give no notice that they will not be answerable. Three directors of a Company gave a joint guarantee to a bank to secure the balance of the Company's account to the amount of 2,000*l*. The Company was afterwards wound up and reconstructed, but the bank was only told that the Company had changed its name, and the account was continued as before: Held, in an action by the bank to recover 2,000*l*. due on the account, that the guarantors were estopped by their conduct from denying that the guarantee remained in force. (V.C. B., March 21, 1885.) *Ashby* v. *Day*, 33 W. R. 631.

Habeas Corpus.—*Prisoner wishing to conduct case in person—Jurisdiction to issue Writ.*—The Habeas Corpus Act, 1804, gives the Court no jurisdiction to issue a writ of *habeas corpus* for the purpose of enabling a person who is in prison to be brought up in order to conduct his own case in person. (April 27, 1885.) *Weldon* v. *Neal*, 54 L. J., Q. B. 399; 33 W. R. 581.

Highway.—*Gas Pipes—Repair of Highway—Steam Roller—Statutory Powers—Injunction.*—A vestry whose duty it was to repair the highways vested in them, but

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not in any particular mode, used for that purpose heavy steam rollers (as most beneficial to the public and the ratepayers), and in doing so damaged gas-pipes laid under the highway at a depth sufficient to sustain ordinary traffic and repair: Held, that the injury not being expressly authorised by statute, the Gas Company was entitled to damages and an injunction. (C. A., May 4, 1885.) *Gas Light and Coke Company* v. *Vestry of St. Mary Abbott's, Kensington*, 15 Q. B. D. 1; 54 L. T., Q. B. 414.

Main Road—Conversion into Highway—Highways and Locomotives Amendment Act—Time.—The Local Government Board has power under sect. 16 of the Highways and Locomotives Amendment Act, 1878, at any time to make a provisional order declaring that a disturnpiked road which has become a main road under the Act shall cease to be a main road and become an ordinary highway. (C. A., May 22, 1885.) *Rey.* v. *Local Government Board* (No. 2), 15 Q. B. D. 70.

Husband and Wife.—*Married Woman—Contract—Separate Property—Conveyance—Married Women's Property Act.*—A policy was assigned in 1843 upon marriage to trustees upon trust to pay the income of the policy moneys to the wife and her assigns in case she should survive the husband during her natural life, for her separate use if she should marry again. During the husband's life the wife contracted to assign his interest in the policy. Held, that her interest being separate property only in a contingency which had not arisen a contract by her to dispose of it was inoperative under the Married Women's Property Act, 1882, sect. 1. subsection 4; semble the contract would bind it if it became separate estate. (Pearson J., June 25, 1885.) *Re Shakespear, Deakin* v. *Lakin*, 33 W. R. 744.

Married Women—Contract before Married Women's Property Act—After-acquired Property.—A contract entered into by a married woman before the commencement of the Married Women's Property Act, 1882, does not bind separate property which she may acquire after the date of the contract, sect. 1. subsection 4 of the Act not being retrospective. (C. A., June 10, 1885.) *Turnbull* v. *Forman*, 15 Q. B. D. 234; 33 W. R. 768.

Married Women—Conveyance—Trust for sale—Acknowledgment—Fines and Recoveries Act—'Bare Trustee.'—Two married women were trustees for sale under a will of real estate with a beneficial interest in the proceeds. The real estate was ordered to be sold by the Court: Held, that the married women were 'bare trustees' within the meaning of sect. 6 of the Vendor and Purchaser Act, 1874, and that a conveyance by them did not require to be acknowledged under the Fines and Recoveries Act. (V. C. B., March 31, 1885.) *Re Dowra, Dowra* v. *Faith*, 29 Ch. D. 693; 33 W. R. 574.

Nullity of Marriage—Impotence—Misconduct of Wife—Want of sincerity—Scotch Law—Triennial cohabitation—Presumption.—A husband and wife cohabited for a period of nineteen months, but the marriage was never consummated. After they had separated the wife gave birth to a child of which the husband was not the father, and the husband brought an action for dissolution of marriage and the wife for a declaration of nullity: Held, on proof of the husband's impotence, that the wife was entitled to a declaration of nullity. The doctrine of 'want of sincerity' in such an action is not recognised by the law of Scotland. Per Selborne, L.C., in English law that doctrine means no more than such conduct, of which lapse of time is one element, as would estop the complainant from claiming relief. Cohabitation for three years without consummation raises a presumption according to the canon law of inability, but such presumption may be rebutted or it may be dispensed with if impotence is clearly proved *aliunde*, the object of the rule being merely to provide that sufficient time may be afforded for ascertaining beyond a doubt the true condition of the party complained of. (H. L., March 5, 1885.) *G.* v. *M.*, 10 App. Cas. 171.

Separate Property—Married Women's Property Act—Contingent Title—Vesting after Act.—A married woman married before the commencement of the Married Women's Property Act, 1882, cannot under sect. 5 of the Act claim as her separate property, property which has vested in her after the commencement of the Act, if her contingent title to it accrued before the Act. (Kay J., July 15, 1885.) *Re Adams' Trusts*, 33 W. R. 834.

Separate Property—Settlement—Married Women's Property Act—Election—Restraint on alienation.—A post-nuptial agreement by a married woman who is also an infant to settle after-acquired property (being void and not merely voidable) does not preclude her from claiming as her separate property, property her title to which has accrued after the commencement of the Married Women's Property Act. A married woman who is a *feme sole* may elect without the intervention of the Court. A married woman who elects must make compensation to the person disappointed by her election, though the only property available for compensation is

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property which she is restrained from alienating. (Chitty J., May 2, 1885.) *Re Queade's Trusts*, 54 L. J., Ch. 786; 33 W. R. 816.

Infant.—*Guardian—Appointment of—Foreign Mother—British subject born abroad—Jurisdiction—Property.*—An infant's grandfather was a natural-born British subject, but the infant herself was born in France, and so was her father. The infant's father had died intestate in France and the infant's property was there. The infant's mother was by French law her legal guardian, but was not a proper person to have the custody of the infant: Held, on application by the infant for the appointment of a guardian, (i) that the infant was a British subject, and (ii) that the Court had jurisdiction to appoint a guardian to the infant and ought under the circumstances to exercise it. (Kay J., May 12, 1885.) *Re Willoughby*, 33 W. R. 724. Since affirmed.

Maintenance—Title of Proceedings—Controlling Trustees—Jurisdiction.—The Court has no jurisdiction to make an order against an infant's trustees for the maintenance of the infant upon a summons intituled in the matter of the infant. In such a case an action should be commenced or an originating summons taken out. (C. A., June 3, 1885.) *Re Lofthouse*, 33 W. R. 668.

Insurance.—*Marine—Insurable Interest—'Free on Board'—Buyer's Risk—Unappropriated Sugar.*—*D. & Co.*, sugar merchants, contracted to sell 200 tons of sugar to *S.* and 200 tons to *B.*, both Bristol merchants, 'free on board.' *D. & Co.* accordingly shipped 400 tons in bags, but did not appropriate specific bags to *S.* or *B.* till after shipment. On the voyage the vessel was lost. *S.* had on shipment insured the sugar coming to him under a floating policy: Held, that 'free on board' meaning at the risk of the buyer, *S.* was liable for the price, and therefore had an insurable, albeit an undivided interest entitling him to recover from the underwriters. (H. L., March 30, 1885.) *Inglis* v. *Stock*, 10 App. Cas. 263.

Landlord and Tenant.—*Assignment—Indemnity—Assignor buying Reversion.*—A sub-lessee who assigns, taking a covenant of indemnity from the assignee and is afterwards made to answer a breach by the assignee of the covenants under the lease, does not lose his right of indemnity by having taken a reassignment of the lease and also purchased the reversion. (C. A., Feb. 14, 1885.) *Re Russell, Russell* v. *Shoolbred*, 29 Ch. D. 254.

Distress—Bailiff appointed by Court—Agricultural Holdings Act—Consent to Jurisdiction—Mistake—Appeal.—A bailiff who has been appointed by a County Court Judge under s. 52 of the Agricultural Holdings Act, 1883, may levy a distress on any holding, whether within or without the district of the County Court Judge who appointed him. Where a party had consented to a County Court Judge's jurisdiction under s. 102 (2) of the Bankruptcy Act, 1883, in ignorance that an order for summary administration had been already made (such orders not being gazetted), the Court held that the County Court Judge had been wrong in granting only limited leave to appeal. Semble informality in levying a distress does not render it void. (March 11, 1885.) *Re Saunders*, Ex parte *Sergeant*, 54 L. J., Q. B. 331; 52 L. T. R. 516.

Distress—Entry—Raising partly open window.—An entry to levy a distress may be lawfully made by raising a partly open window: secus if the window is closed, though unfastened. The latch of a *door* may lawfully be lifted to effect an entrance though the door be closed. (June 30, 1885.) *Crabtree* v. *Robinson*, 15 Q. B. D. 312.

Lease—Construction—Sporting Rights—'By way of grant and not of reservation.'—*A.* demised an estate to *B.* reserving the timber and minerals, and also reserving the right of ingress etc. for cutting and working, 'and also by way of grant and not of reservation' the exclusive right of sporting: Held, that grant must be read as regrant, and that the right of sporting did not pass to the lessee. (C. A., April 14, 1885.) *Houstoun* v. *Marquis of Sligo* (No. 2), 52 L. T. R. 870.

Lease—Partly-furnished House—Implied warranty of fitness.—The principle laid down in *Smith* v. *Marrable* (11 M. & W. 5), that on the letting of a furnished house there is an implied warranty that the house is reasonably fit for habitation, only applies where the occupation is temporary, e.g. in the case of furnished lodgings at the seaside (V.C. B., March 19, 1885.) *Powell* v. *Chester*, 52 L. T. R. 722.

Long Term—Enlargement into Fee Simple—'Rent having no money value'—Conveyancing Act.—A term of 500 years was granted in 1647, the tenant yielding and paying therefor yearly 'one silver penny:' Held, that the rent incident to the reversion was one having 'no money value' within s. 65 (1) of the Conveyancing Act, 1881, and that the beneficial owner of the term was entitled to enlarge it into a fee. (Pearson J., May 14, 1885.) *Re Chapman & Hobbs*, 33 W. R. 703; 52 L. T. R. 805.

Recovery of Land—Action by Landlord—Expiration of Title—Writ of Possession.—A plaintiff entitled to a reversion of three days on the expiration of the term com-

Landlord and Tenant—(continued).

menced an action against the tenant who was holding over to recover possession of the land and obtained judgment: Held, that the plaintiff was entitled to a writ of possession though his title as reversioner had expired unless the tenant could show that the issue of such writ would be unjust and futile by reason of some one else being entitled to the property. (C. A., June 18, 1885.) *Knight* v. *Clarke*, 15 Q B D. 294.

Lunacy.—*Lunatic—Confinement—Examination by Justices—Medical Assistance—Bona fides—Jurisdiction.*—An examination which is made by two Justices *bona fide* for the purpose of satisfying themselves of the sanity or insanity of the person examined, though it only lasts five minutes and is not made in the presence of their medical assistant, is sufficient to enable the Justices if satisfied of the person's insanity to make an order for his confinement, the object of the Lunatic Asylum Act being not to enable justices to adjudicate a person to be *non compos mentis*, but to enable them to place provisionally under proper care persons who require to be so placed. (C. A., diss. Coleridge C.J., May 4, 1883.) *Reg.* v. *Whitfield*, 15 Q. B. D. 122; 54 L. J., M. C. 113.

Property—Improvement Expenses—Charging one of two Estates—Jurisdiction—Lunacy Regulation Act.—The Court of Appeal has no jurisdiction under sect. 118 of the Lunacy Regulation Act, 1853, to charge land of which a lunatic is tenant in tail with expenditure incurred on another's estate of which he is only tenant for life. (C. A., February 23, 1885.) *Re Varasour*, 29 Ch. D. 306.

Master and Servant.—*Sale of horse—Warranty by Servant—Authority—'Horse Dealer'—Riding-school Proprietor*—The servant of a proprietor of a riding-school being entrusted by his master with a horse for sale but not authorised to warrant it, sold the horse and gave a warranty with it: Held, that the master was a person who dealt in horses within the rule laid down in *Howard* v. *Sheward* (L. R., 2 C. P. 148; 15 L. T. R. 183), and was liable on the servant's warranty. (February 27, 1885.) *Baldry* v. *Bates*, 52 L. T. R. 620.

Medical Practitioner.—*Unregistered Practitioner—Agreement by—Legality—Medical Act*, 1858.—*D.*, an unregistered practitioner at *R.*, engaged an assistant, a clause in the agreement providing that the assistant was not for five years after the engagement had ended to practise within a certain radius of *R.* The assistant having committed a breach of the agreement: Held, that *D.*'s not being registered under the Medical Act, 1858, disentitled him, as an unqualified person under 55 George III. c. 174. sect. 14, to an injunction. (Pearson J. reversed, C. A., March 22, 1885.) *Davies* v. *Makuna*, 33 W. R. 668; 52 L. T. R. 472.

Metropolis.—*Building Line—Certificate of Surveyor—Conclusiveness—Metropolis Management Act.*—The certificate of the architect of the Metropolitan Board of Works as to the 'general line of building' mentioned in sect. 75 of the Metropolis Management Amendment Act, 1862, is conclusive, and cannot be reviewed by a police magistrate on a summons for a breach of the sect. (H. L., February 26, 1885.) *Spackman* v. *Plumstead District Board of Works*, 10 App. Cas. 229; 54 L. J., M. C. 81.

Vestryman—Qualification—Rating—Paying Tenants' Rates—Penalty—A person is not qualified to be elected or to act as a vestryman within the meaning of the Metropolis Local Management Act, sect. 6, by paying the rates of his tenants. He must himself be the occupier of real property in the parish and be rated in respect of it. (April 17, 1885.) *Mogg* v. *Clark*, 15 Q. B. D. 82; 54 L. J., Q. B. 334.

Mortgage.—*Fixtures—Tenancy subsequent to Mortgage—Rights of Mortgagee.*—A mortgagee of leasehold premises cannot sell trade fixtures brought upon the mortgaged premises by a tenant of the mortgagor under a tenancy created subsequently to the mortgage. (May 21, 1885.) *Sanders* v. *Davis*, 15 Q. B. D. 218; 33 W. R. 655.

Priority—Mortgagor buying Reversion—Lien for Purchase Money—Rights of Mortgagee.—*N.*, the owner of the equity of redemption in renewable leaseholds subject to a mortgage, purchased the reversion from the Ecclesiastical Commissioners. Pending the negotiations for the purchase *N.* borrowed 300*l.* from *L.* who had no notice of the mortgage, giving her an agreement to execute a charge on the property when conveyed to him: Held, that *N.* could hold the reversion only on the same terms as he would have held a renewed lease, and that *L.*, being in no better position, was not entitled to priority for the 300*l.* over the mortgagee. (Pearson J., March 3, 1885.) *Leigh* v. *Burnett*, 29 Ch. D. 231; 33 W. R. 578; 52 L. T. R. 458.

Priority—Negligence—Title-deeds—Inquiry—Equitable Mortgagee without notice—Delivery up of Title-deeds—Judicature Act.—*A.* took a legal mortgage from his solicitor. He made several inquiries about the title-deeds, and was told that they were in safe custody for him. The solicitor afterwards deposited the deeds by way of equitable mortgage with *B.*, who had no notice of the prior mortgage: Held,

Mortgage—(continued).

that *A.*, not having been guilty of any negligence, could not be postponed to *B.* Held also, that *A.* was entitled to recover the deeds from *B.* (North J., April 23, 1885.) *Manners* v. *Mew*, 29 Ch. D. 725.

Priority—Registration—Land held in Trust for Sale—Judgment Creditor.—Incumbrancers on land in Middlesex held in trust for sale do not by registration under 7 Anne c. 20 acquire any priority, land so converted in equity not being within the meaning of the words 'hereditaments in the said county.' A judgment creditor does not, by giving notice to the trustees, acquire priority over incumbrancers on the trust fund who have not given notice. (Kay J., March 13, 1885.) *Arden* v. *Arden*, 29 Ch. D. 702; 54 L. J., Ch. 655; 25 L. T. R. 610.

Priority—Negligence of Trustee—Deposited Deeds—Infant Cestui que Trust—Title-deeds—Who entitled to possession of.—The trustee of a settlement of leaseholds made no inquiry about the title-deeds. The title-deeds, as the trustee if he had inquired would have found out, had been deposited by the settlor with a bank to secure an overdraft: Held, though the account was not overdrawn till after the date of the settlement, that the negligence of the trustee must postpone his legal estate to the equitable title of the bank, coupled with the possession of the deeds, and that the right of an infant *cestui que* trust under the settlement was as against the bank no higher than that of the trustee. Notice to a bank holding a customer's title-deeds of the customer's marriage does not put the bank upon inquiry as to any settlement. A tenant for life of settled leaseholds is not entitled as against his trustee to possession of the title-deeds. (Pearson J., March 3, 1885.) *Lloyd's Banking Co.* v. *Jones*, 29 Ch. D. 221; 52 L. T. R. 469.

Municipal Corporation.—*Election—Nomination Paper—Misnomer—'Commonly understood'—Municipal Corporation Act.*—A burgess who was entered on the burgess-roll as Charles Burman subscribed a nomination paper of a candidate at a municipal election as Charles Arthur Burman, his full and proper name: Held, that the nomination was bad. Sect. 241 of the Municipal Corporations Act providing that no misnomer or inaccurate description of any person shall hinder the operation of the Act if the description is such as to be 'commonly understood' means understood by comparing the nomination paper and the burgess-roll, as where abbreviations are used and does not apply to such a case. (March 31, 1885.) *Moorhouse* v. *Linney*, *Thorpe* v. *Linney*, 15 Q. B. D. 273; 33 W. R. 704.

Patent.—*Infringement—Particulars of objection—Partners defending in same interest—Patentee impeaching Patent—Estoppel.*—Where there are two or more defendants to an action for infringement of a patent defending in the same interest, though they have severed in their defences, it is not necessary that each should deliver particulars of objection, the object of 15 & 16 Vic. c. 83. sect. 41 being only to prevent surprise. A bankrupt patentee whose trustee has sold the patent is not estopped in an action for infringement from impeaching the validity of his own patent. (H. L., March 17, 1885.) *Smith* v. *Cropper*, 10 App. Cas. 249.

Poor Law.—*Settlement—Children—Permanent Residence—Father's intention to fix.*—A father residing in the Holborn Union sent his children, aged respectively three and five, to live with some persons in the Chertsey Union. The justices found that the father did not intend that his children should not return to him: Held, that the Divisional Court was wrong in holding that there was no evidence to justify the justices in coming to such a conclusion, and that the children, who had became paupers, were chargeable to the Holborn Union. *Guardians of Holborn Union* v. *Guardians of Chertsey Union*, 14 Q. B. D. 289; 33 W. R. 344 reversed, C. A., May 12, 1885, 15 Q. B. D. 76; 33 W. R. 698.

Settlement—Derivative settlement—Pauper over Sixteen—Divided Parishes Act.—The exception in favour of a wife and children under sixteen engrafted on sect. 35 of the Divided Parishes Act, 1876, abolishing derivative settlements, does not apply to a pauper who at the time when her settlement is being inquired into is over sixteen. (May 5, 1885.) *Reg.* v. *Guardians of St. Mary, Islington*, 15 Q. B. D. 95; 54 L. J., M. C. 110; since affirmed (C. A., July 23, 1885), 15 Q. B. D. 339.

Power.—*Appointment—General Power—Married Woman—Rule against Perpetuities.*—Where a married woman who is donee of a general power of appointment by deed or will creates limitations under it, the period of the commencement of the limitations under the rule against perpetuities is the time of the execution of the power and not the creation of it. (Chitty J., April 20, 1885.) *Rous* v. *Jackson*, 29 Ch. D. 521; 54 L. J., Ch. 732; 33 W. R. 773; 52 L. T. R. 733.

Practice.—*Admiralty—Arrest.*—The master of a ship who moves her after notice by telegram of the issue of a warrant of arrest is guilty of a contempt of Court. 'The

Practice—(continued).

Seraglio,' 10 P. D. 120. Reference—Rule as to costs where one-third of claim disallowed, disapproved. (C. A.) 'The Friedeberg,' 10 P. D. 112; 33 W. R. 687.

Amendment—Power to amend its own records inherent in every Court—Procedure to vary record. (C. A.) *Re Swire, Mellor* v. *Swire*, 33 W. R. 785.

Appeal—Divisional Court—Appeal lies from, in case stated under 12 & 13 Vict. c. 45. sect. 11. (C. A.) *Guardians of Holborn Union* v. *Guardians of Chertsey Union* (No. 2), 15 Q. B. D. 76; 33 W. R. 698. Divorce Action—Appeal from refusal to grant new trial in, must be brought within fourteen days. (C. A.) *Ahier* v. *Ahier*, 10 P. D. 110. Notice—Service of, is good on the solicitor on the record so long as the fruits of the judgment have not been obtained. (C. A.) *De la Pole* v. *Dick*, 29 Ch. D. 351; 33 W. R. 585.

Bankrupt, cannot maintain action against a person for maliciously procuring the bankruptcy while bankruptcy unannulled. (H. L.) 10 App. Cas. 210; 33 W. R. 709.

Conduct of Sale—The Court of Appeal will not interfere with the Judge's discretion as to. (C. A.) *Re Love, Hill* v. *Spurgeon*, 29 Ch. D. 348.

Costs—Administration action—Residuary legatee bringing, is entitled to costs out of the estate. (C. A.) *Re M'Clellan, M'Clellan* v. *M'Clellan*, 29 Ch. D. 495; 54 L. J., Ch. 659. Interest on, runs from date of judgment. *Re London Wharfage and Warehousing Co.*, 33 W. R. 836. Reference—Costs 'to abide the event' construed distributively. *Hawker* v. *Brear*, 14 Q. B. D. 841; 54 L. J., Q. B. 315; 33 W. R. 613.

Default—Application to set aside judgment by, should be made to the Judge of first instance. (C. A.) 29 Ch. D. 322; 33 W. R. 738.

Default of Defence—Agreement alleged in statement of claim required to be verified on motion for judgment. *Holmes* v. *Shaw*, 52 L. T. R. 797.

Discovery—Documents—A joint affidavit should run 'We have not in our possession or power and neither of us has,' &c. (C. A.) *Fendall* v. *O'Connell*, 33 W. R. 619; 52 L. T. R. 553. Interrogatory as to, cannot be administered to a party who has made a sufficient affidavit of documents. (C. A.) *Hall* v. *Truman, Hanbury & Co.*, 29 Ch. D. 337. Professional communications—'Once privileged always privileged.' (C. A.) *Pearce* v. *Foster*, 15 Q. B. D. 114; 54 L. J., Q. B. 432. Interrogatories—Form of, settled by Court of Appeal acting as arbitrators. (C. A.) *Bidder* v. *Bridges*, 29 Ch. D. 29; 52 L. T. R. 455. Documents in possession of liquidator of dissolved company ordered to be produced. *London & Yorkshire Bank* v. *Cooper*, 15 Q. B. D. 7; 33 W. R. 751; since affirmed, 54 L. J., Q. B. 495.

Divorce—Leave to administer interrogatories in a nullity suit should be made to a Judge of Divorce Division, not to Registrar. (C. A.) *Harvey* v. *Lovekin* (No. 2), 10 P. D. 122.

Evidence—Party filing affidavit after judgment cannot demand the expenses of producing deponent for cross-examination in the first instance from the party requiring production. *Re Baker, Connell* v. *Baker*, 29 Ch. D. 711; 52 L. T. R. 421.

Inquiries—O. 33. r. 2 does not authorise sending the whole of an action, e. g. involving priorities of mortgages depending on fraud or notice, to Chambers. (C. A.) *Garnham* v. *Skipper* (No. 2), 29 Ch. D. 566.

Mortgage—Foreclosure—Affidavit of non-payment by mortgagee dispensed with. *Barrow* v. *Smith*, 30 W. R. 743; 52 L. T. R. 798; not dispensed with, *Frith* v. *Cooke*, 33 W. R. 688.

Particulars of wilful default ordered in action against executors, though one instance had been specified. *Re Austice, Austice* v. *Hibbell*, 33 W. R. 557; 52 L. T. R. 572.

Parties—Adding—O. 16. r. 11 is not intended to enable a plaintiff who has no cause of action to associate with him somebody who has. (C. A.) *Walcott* v. *Lyons*, 29 Ch. D. 584; 52 L. T. R. 399.

Referee—The power of the Court under O. 36. r. 7 (a) to order a trial by a special referee means a special referee appointed by agreement between the parties. *The London & Lancashire Fire Insurance Co.* v. *The British Assurance Co.*, 54 L. J., Q. B. 302; 52 L. T. R. 385.

Service out of jurisdiction allowed on defendant in Scotland in action for injunction. O. 11. r. 1 (e), (f). *The Lisbon-Berlyn (Transvaal) Gold Fields Co.* v. *Heddle*, 52 L. T. R. 796.

Trial—Place of—Chancery action ordered to be tried in London though plaintiff had named Cardigan. (C. A., March 13, 1885.) *Powell* v. *Cobb*, 29 Ch. D. 486; 54 L. J., Ch. 475.

Revenue.—*Inhabited House Duty—Exemption—Son of Caretaker to reside on Premises—'Servant or other Person'—Customs and Inland Revenue Act.*—A woman was employed as caretaker of business premises, one of the conditions being that her son, who was a clerk but not of the employer, should also, for safety, sleep on the premises: Held, that the case was not within sect. 13. subs. 2 of the Customs and

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Inland Revenue Act, 1878, so as to exempt the premises from Inhabited House Duty. (March 20, 1885.) *Weguellin* v. *Waygall*, 14 Q. B. D. 838; 54 L. J., Q. B. 308.

Probate Duty—Lunatic's Estate—Personalty invested in Realty—Reconversion.—Personal estate of a lunatic was, by an order of the Lords Justices sitting in lunacy, invested in the purchase of real estate, the conveyance made under the order containing a declaration that such real estate was to be considered as part of the personal estate of the lunatic: Held, that the property must be treated as reconverted, though there was no imperative trust for sale, and was liable on the lunatic's death to probate duty. (March 20, 1885.) *Att.-Gen.* v. *Marquis of Ailesbury*, 14 Q. B. D. 895; 54 L. J., Q. B. 324; 33 W. R. 731.

Sale of Goods.—*Frauds, Statute of—Receipt and Acceptance.*—Wheat sold under a parole contract was brought in a barge in sacks to defendant's mill, and the next morning some of the sacks were drawn up into the mill and examined with the sample, after which the wheat was rejected: Held, a receipt and acceptance within sect. 17 of the Statute of Frauds as amounting to a recognition of the contract. (C. A., June 10, 1885.) *Page* v. *Morgan*, 15 Q. B. D. 228; 54 L. T., Q. B. 434; 33 W. R. 793.

Stoppage in transitu—Order to forward to Shippers—End of transit—'Destination'—Commission Agent.—*E.*, a London commission agent for a Jamaica firm, ordered goods of *T. & Co.*, English manufacturers, telling them to forward them to shipping agents at Southampton, which the manufacturers did. The particulars sent by *T. & Co.* with the goods stated that they were marked E. M. (the initials of the Jamaica firm), Kingston, Jamaica, but the columns for 'consignee' and 'destination' were left blank. Shortly after the ship sailed *E.* became bankrupt, and *T. & Co.* stopped the goods: Held, that the relation of *E.* and *T. & Co.* being that of vendor and purchaser, the transit was at an end when the goods reached Southampton, and that *E.'s* trustee in bankruptcy was entitled to the proceeds of sale. Per Brett M.R. Destination means not only the name of the place but of the person to whom goods are to be sent. (C. A., Feb. 27, 1885.) *Re Isaacs, Ex parte Miles*, 15 Q. B. D. 39.

Settlement.—*Settled Land Act—Improvements—Experimental expenditure—Silos—Trustees—Separate appearance.*—The Court will not sanction the application of capital moneys under the Settled Land Act for experimental improvements of the estate, such as the erection of silos, or allow such expenditure if already incurred by the tenant for life. On an application under sect. 21 the trustees of the settled land, though they consent, should appear separately from the tenant for life to assist the Court in investigating the matter. Semble a silo is within sect. 25 (xi). (C. A., June 24, 1885.) *Re Broadwater Estates*, 33 W. R. 738.

Settled Land Act—Tenant for life—Sale—Pending Action—Sanction of Court.—A tenant for life under the Settled Land Act, 1882, may sell without the sanction of the Court, notwithstanding the pendency of an administration action commenced before the Act. (Chitty J., July 27, 1885.) *Lady Cardigan* v. *Curzon-Howe*, 33 W. R. 836.

Settled Land Act—Tenant for Life—Equitable Estate—Right to receive Rents—Power of Leasing—Appointment of Trustees.—Where a married woman, equitable tenant for life of an estate devised to her in 1884, claimed as against the trustees to receive the rents and to grant leases under the Settled Land Act, 1882, undertaking to keep the buildings in repair (which the trustees were directed to do under the will), the Court refused to restrain her by injunction, but appointed trustees of the estate for the purposes of the Settled Land Act. (Pearson J., April 24, 1885.) *Wade* v. *Wilson*, 33 W. R. 610.

Settled Land Act—Tenant for Life—'Tenant for Life under a lease at a Rent.'—The owner in fee of a public-house, subject to a 30 years' lease, devised it to trustees upon trust to allow his widow to receive the rent during the remainder of the term if she should so long live, and if she outlived the term upon trust to sell and pay her an annuity equal to the rent: Held, that the widow was not a tenant for life within the meaning of sect. 58 of the Settled Land Act. (C. A., March 7, 1884.) *Re Hazle's Settled Estates*, 29 Ch. D. 78; 54 L. J., Ch. 628.

Sewers.—*Commissioners of—Widening Street—Right to take more Land that admitted to be necessary—Superfluous Land—Right of Preemption.*—The Commissioners of Sewers are not entitled to take compulsorily, for the purpose of widening a street under sect. 80 of 57 Geo. III. c. 29, any more of a house or land which obstructs the contemplated improvement than they *bonâ fide* adjudge to be necessary for the scheme. If they have, however, in the honest belief that it was necessary, taken more than proves to be necessary, such adjudication cannot be questioned; but per Kay, J., the person from whom the land has been taken has a right of preemption in respect of such

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superfluous land, and this right is not affected by sect. 54 of the City of London Sewers Act, 1851. (C. A., January 19, 1885.) *Gard* v. *Commissioners of Sewers of City of London*, 28 Ch. D. 486.

Sheriff.—*Interpleader—Wrongful Seizure—Payment under Protest—'Proceeds or Value of Goods'—Trespass—Substantial Grievance.*—A sheriff, under a fi. fa. against *S.*, entered and seized goods on premises belonging to *J.*, believing them to be goods of *S.* *J.* paid out the sheriff under protest, and brought an action for trespass and wrongful seizure. The sheriff interpleaded: Held, that he was entitled to interplead, the money paid under protest being 'proceeds or value of goods or chattels taken in execution' within the meaning of Rules of Court 1883, O. 57. r. 1 (*b*). In such a case the trespass and wrongful seizure constitute one act, and the sheriff, if he has made a *bonâ fide* mistake and the plaintiff has suffered no substantial wrong, will be protected. (C. A., April 22, 1885.) *Smith* v. *Critchfield*, 14 Q. B. D. 873; 54 L. J., Q. B. 366.

Ship and Shipping.—*Bill of Lading—Charter-party—Stipulation as to freight—Incorporation—Inconsistency.*—Where a charter-party and a bill of lading differ the bill of lading must prevail. A bill of lading contained a clause 'all extra expenses and other conditions as per charter-party.' The freight under the bill of lading and the charter-party was different: Held, that the bill of lading only incorporated the conditions of the charter-party so far as they were not inconsistent with its own terms, inter alia, as to freight. (C. A., Dec. 16, 1884.) *Gardner* v. *Trechmann*, 15 Q. B. D. 154.

Collision—Sailing Rules—Probability of risk.—The master of a steamship saw the green and white lights of a vessel which was approaching end on on the starboard side, coming into line about a quarter of a mile distant: Held, that as this would indicate to a sailor a probability that the vessel was porting her helm there was a risk of collision, and the master ought at once to have reversed under Art. 18. (C. A., June 17, 1885.) *The Stanmore*, 10 P. D. 134.

Demurrage—Charter party—'Ready Quay berth as ordered by charterer'—Detention.—A vessel was by the terms of a charter-party to load a cargo and proceed to the London Dock 'to such ready quay berth as ordered by the charterers,' demurrage to be at the rate of 30*l.* per running day. When the vessel arrived at the London Dock to which she had been ordered there was no quay berth ready: Held, that the charterers were bound to name a quay berth which was ready, and were liable for the detention as being in the nature of demurrage. (C. A., June 4, 1885.) *Harris* v. *Jacobs*, 15 Q. B. D. 247; 54 L. J., Q. B. 492.

Limitation of Liability—Space for Berthing Crew—Deduction.—Foreign shipowners, in an action for limitation of liability, are entitled, under the Merchant Shipping Act, 1854, to deduct from the registered tonnage the spaces enclosed for the use of the crew, but they are not entitled to the further deductions allowed by the Act of 1867 unless they have complied with its provisions. (Dec. 10, 1884.) *The Palermo*, 10 P. D. 21; 54 L. J., P. D. & A. 46; 52 L. T. R. 390.

Salvage—Cargo—Liability of Shipowners.—Neither a ship nor its owners are primarily liable to pay for the salvage of the cargo. (April 17, 1885.) *The Raisby*, 10 P. D. 114.

Salvage—Cargo Owners—Liability—Warranty of Seaworthiness—Latent Defect—Exceptions in Bill of Lading.—The crank shaft of a steamship, the *G.*, laden with cargo, broke, owing to a latent flaw in the welding, and she had to be towed several hundred miles by a steamship belonging to the same owners: Held, in a salvage action by the owners master, and crew of the salving ship against the owners of cargo on the *G.*, that the owners of the *G.*, not having satisfied the implied warranty of the *G.*'s seaworthiness, could not recover, and that an exception in the bill of lading of 'all and every the dangers and accidents of the seas, rivers, and canals, and of navigation of whatever nature or kind' made no difference, the 'dangers and accidents' referred to being those happening to a seaworthy ship. (March 31, 1885.) *The Glenfruin*, 10 P. D. 103; 54 L. J., P. D. & A. 49.

Solicitor.—*Bill of Costs—Taxation after payment—Pressure—Overcharges.*—A bill of costs will not be ordered to be taxed after payment unless there are 'special circumstances.' 'Special circumstances' are pressure combined with overcharges, or overcharges so gross as to amount to fraud. Per Bowen & Fry, L.JJ. These are not the only 'special circumstances.' Mortgagor, who had paid mortgagee's bill of costs (full of overcharges) in order to obtain his concurrence in a transfer and so save an impending sale, held not to have paid under pressure. (C. A., Bowen L. J., diss. March 31, 1885.) *Re Boycott*, 52 L. T. R. 482.

Charging Order for Costs—Discharge of Solicitor before Trial—Property Recovered

Solicitor—(continued).

or Preserved—Security Paid.—*D.*, a solicitor who acted for the plaintiff in an administration action, was discharged, the action at the time of his discharge being set down for trial. At the trial the plaintiff recovered 278*l.*: Held, that *D.* was entitled to a charging order on the 278*l.* subject to the lien of the acting solicitor, but not to a charging order on a sum which the plaintiff had been compelled to pay into Court as security for costs. (Kay J., April 1. 1885.) *Re Wadsworth, Rhodes* v. *Sugden*, 29 Ch. D. 517; 54 L. J., Ch. 638; 33 W. R. 558; 52 L. T. R. 613.

Bill of Costs—Taxation—Third Counsel—Solicitor and Client—Unusual Expense—Warning Client.—A solicitor employed a third counsel in a case before the Court of Appeal without informing his client that he would or might not be allowed such costs even if successful on taxation as between party and party: Held, on taxation as between solicitor and client, that the costs had been properly disallowed, a third counsel in the Court of Appeal being an 'unusual expense' within the rule laid down in *Re Blyth & Fanshawe* (10 Q. B. D. 207). (June 19, 1885.) *Re Broad & Broad*, 15 Q. B. D. 252; 33 W. R. 749; 52 L. T. R. 819; since affirmed, 52 L. T. R. 888.

Lien—Books of Company—Books to be kept at Registered Office.—A solicitor cannot acquire a lien over books and papers of a Company in his possession which it is the duty of the company to keep at their registered office. (Kay J., April 4, 1885.) *The Anglo-Maltese Hydraulic Dock Company*, 54 L. J., Ch. 730; 33 W. R. 652.

Striking off Roll—Jurisdiction of Court of Appeal—Restraining Renewal of Certificate.—The Court of Appeal has jurisdiction to strike a solicitor off the roll for misconduct brought to their notice in the course of an appeal. Where an uncertificated solicitor had been guilty of misconduct in not disclosing the existence of a mortgage the Court, instead of striking him off the roll or suspending him, restrained him from renewing his certificate without the leave of the Court (C. A., Jan. 21, 1885.) *Re Whitehead*, 28 Ch. D. 614; 54 L. J., Ch. 796; 33 W. R. 621; 52 L. T. R. 703.

Trade Mark.—*Registration—Expunging—Mark common to trade—Five years' registration—Conclusiveness.—W. & Co.*, manufacturers of mineral waters, registered in 1876 as a trademark a device representing a siphon with a hand and glass. Substantially the same device had been used by more than three manufacturers of mineral waters previously to *W. & Co.*'s registration: Held, that the device was common to the trade, and being one which ought never to have been registered the fact that the mark had been five years on the register did not on the true interpretation of s. 76 of the Patents Designs and Trade Marks Act, 1883, prevent its being expunged. (Pearson J., Feb. 16, 1885.) *Wragg's Trade Mark*, 29 Ch. D. 551; 52 L. T. R. 467.

Registration—'Fancy Words'—'Alpine'—Embroidery.—Subsection 1 (c) of s. 64 of the Patents Designs Trade Marks Act, 1883, allowing registration as a trade mark of 'a fancy word or words not in common use,' includes not only purely fancy words, such as 'Opoponax,' but words used in a fanciful sense with reference to the goods registered, as 'Alpine' for embroidery. It excludes such words as 'Royal' or 'Imperial.' (Chitty J., May 22, 1885.) *Re Trade Mark 'Alpine,' Stapley Smith's Application*, 54 L. J., Ch. 727; 33 W. R. 725.

Trustee.—*Appointment of New Trustees—Power—Conveyancing and Law of Property Act—Executor of Sole Trustee.*—The executor of a sole trustee may exercise the power of appointing new trustees given by sect. 31 of the Conveyancing and Law of Property Act, 1881, to the 'representatives of the last surviving or continuing trustee.' (Pearson, J., March 28, 1885.) *Re Shafto's Trusts*, 29 Ch. D. 247; 33 W. R. 728.

Breach of Trust—Primary Liability—Contribution—Inquiry.—In an action against trustees for breach of trust, in which the trustees had given each other cross notes of claim for contribution, the Court, under O. 16. r. 55, directed an inquiry how and in what proportions as between the two trustees the amount ordered to be paid by them should be borne and paid. (Chitty, J., December 3, 1883.) *Sawyer* v. *Sawyer*, (No. 2), 28 Ch. D. 595.

Constructive Trustee—Renewable Lease—Tenant for Life—Purchase of Reversion.—A tenant for life of renewable leaseholds purchasing the reversion becomes a trustee of it for the persons entitled in remainder. (C. A., February 3, 1885.) *Phillips* v. *Phillips*, 29 Ch. D. 673.

Vesting Order—Death of Sole Trustee—No Personal Representation—'Such estate as the Court shall direct.'—On the death of a sole surviving trustee, the Court has jurisdiction, under sect. 34 of the Trustee Act, if there is no personal representative, to make an order vesting the property in new trustees for all the estate therein of the deceased trustee. (Kay J., March 28, 1885.) *Re Rackstraw's Trusts*, 33 W. R. 559; 52 L. J. R. 612.

Vendor and Purchaser.—*Compensation—Mistake as to Acreage—'Be the same more or less.'*—A vendor agreed to sell and a purchaser to buy 'all that land in *W.* contain-

Vendor and Purchaser—(continued).

ing forty acres or thereabouts, be the same more or less, delineated in the plan annexed hereto and therein coloured pink,' for £9000. There was the common condition for compensation. The land contained in fact 41 a. 1 r. 10 p.: Held, that the vendor was not entitled to any increase of the purchase money. (V. C. B., March 26, 1885.) *Re Orange* v. *Wright's Contract*, 54 L. J., Ch. 590; 52 L. T. R. 606.

Conditions of Sale—Requisitions on Title—'Unable or Unwilling to Comply'—Right to Rescind.—On the sale of a small property, one of the conditions provided that if the purchaser should make any requisition with which the vendor 'should be unable or unwilling to comply,' the vendor might rescind. The purchaser made and insisted on some onerous requisitions and the vendor rescinded: Held, he was entitled to do so though the purchaser offered afterwards to withdraw the requisitions. (C. A., May 1, 1885.) *Re Dames & Wood*, 33 W. R. 685.

Conditions of Sale—Undisclosed Liability—Objection—Vendor's right to rescind.—Land was conveyed to *C.*, he his heirs and assigns to keep in repair a certain wall fence on the land. The trustees for sale under *C.*'s will entered into a contract for sale of the land but neither the particular nor conditions contained any reference to the liability to repair the wall: Held, that whether the liability was one running with the land or not, the purchaser was entitled to a conveyance simpliciter of the land without the insertion of any words imposing the liability on him, and that the vendor was not entitled to rescind under a condition giving him liberty to do so, if the purchaser should insist on any objection or requisition to inter alia 'the title abstract or conveyance' with which the vendor was unable or unwilling to comply. A condition for rescission in such terms is not a proper one except under very special circumstances. (Pearson, J., Feb. 14, 1885.) *Re Hardman* v. *Child*, 54 L. J. Ch. 695; 33 W. R. 544; 52 L. T. R. 465.

Contract—Restrictive Covenants—Non-disclosure—Rescission—Mutual Covenants—Right to Enforce.—A Brick and Tile Company agreed to buy a plot of land. The agreement contained a general condition that the property was sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not, but did not disclose that the property was subject to a restrictive covenant against being used as a brickfield: Held, that the purchaser on discovering the truth was not precluded either by the condition or by sects. 3, subs. 3 (6) of the Conveyancing Act, 1881, from rescinding. If restrictive covenants are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them inter se for their own benefit. Whether they are so meant or only for the benefit of the vendor is a question of fact. (May 20, 1885.) *Nottingham Patent Brick and Tile Company* v. *Butler*, 15 Q. B. D. 261.

Title-deed not in Vendor's possession—Expense of production—Conveyancing Act.—A purchaser cannot be required under sect. 3 (6) of the Conveyancy Act, 1881, to pay the expense of procuring a copy of a deed not in the vendor's possession if such deed is part of the title and is not abstracted. (C. A., June 30, 1885.) *Re Johnson* v. *Tustin*, 33 W. R. 737.

Title—Defect—Purchaser's Knowledge—Mistake—License to assign—Want of—Repudiation.—A purchaser who has agreed to buy with knowledge of restrictive covenants undisclosed by the abstract is not precluded from objecting to the title, if he has entered into the agreement under an erroneous belief that the covenants have been extinguished. Semble a purchaser cannot repudiate an agreement on the ground of the vendor's want of a license to assign if the time to furnish the license has not arrived. (C. A., March 30, 1885.) *Ellis* v. *Rogers*, 29 Ch. D. 661.

Vendor and Purchaser Act—Payment under mistake of Law—Summons—Action.—Money paid as interest under a mistake of law cannot be recovered on summons under the Vendor and Purchaser Act but must, if recoverable at all, be recovered by action. (V. C. B., March 13, 1885.) *Re Young* v. *Harston's Contract*, 29 Ch. D. 691; 33 W. R. 516; 52 L. T. R. 571.

Will—*Exoneration of personal Estate—Gift to Charity—Impure Personality—Lapse—Primary Liability for Debt.*—A testatrix devised all her real estate in trust to pay her debts and legacies in exoneration of her personal estate, which she gave to a charity. Part of the personal estate was impure personality as to which the gift lapsed: Held, that the impure personality so lapsing was the primary fund for payment of the debts and legacies. (V. C. B., March 30, 1885.) *Kilford* v. *Blaney, Re Meere*, 29 Ch. D. 145; 33 W. R. 639.

Construction—Share of Residue to fall into Residue.—A testator bequeathed the residue of his personal estate, subject to a life interest to his wife, to his sister and three brothers in the event of his sister dying unmarried in the wife's lifetime (which happened) her ¼th share to 'fall into the residue:' Held, that in the events which

Will—(continued).

had happened there was a division of the residue into 3rds and not into 4ths, and not an intestacy as to the sister's ¼th. (V. C. B., March 30, 1885.) *Re Rhoades Lane* v. *Rhoades*, 29 Ch. D. 142; 54 L. J., Ch. 513; 33 W. R. 608.

Construction—'To become the property of her heirs'—Absolute or life Interest.—A testator gave the sum of 1000*l.* after the death of his widow to *M.* 'the same to become the property at her death of her heirs.' *M.* died during the widow's lifetime intestate leaving her husband surviving: Held, that the 1000*l.* did not vest absolutely in *M.* so as to pass to her husband, but belonged to *F.* who was heir-at-law and sole next of kin of *M.* (Kay J., Feb. 2, 1885.) *Re Russell*, 52 L. T. R. 559.